

Free movement of services and non-discriminatory collective action

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1. Introduction

The status of the right to collective action and its relationship to the freedom of movement established in the Treaty on the Functioning of the European Union (TFEU or the Treaty) has for long been an unsettled issue in Union law.¹ However, in December 2007 the European Court of Justice (the ECJ or the Court) delivered two landmark judgments, *Viking*² and *Laval*³, on the conflict between the right to collective action protected by national law on the one hand and the economic freedoms of movement guaranteed by the Treaty on the other. At stake in *Viking* was the right of the Finnish seamen's Union (FSU) to resort to industrial action vis-à-vis the right of Viking – a ferry operator incorporated under Finnish law – to freely establish itself in another Member State. The aim of the action was to prevent Viking from reflagging one of its vessels to Estonia, which would enable Viking to reduce wage costs. In support of the action, the International Transport Worker's Federation (ITF) issued a circular communication against so called "flags of convenience", requesting its members, i.e. national seafarer's unions, not to engage in negotiations with Viking. As a consequence, Viking challenged the action taken by the FSU as well as the circular issued by the ITF under Article 49 TFEU as contravening the freedom of establishment.

In *Laval*, the conflict arose between the Swedish builder's union (Byggnads) and Laval, a Latvian building company who posted workers to Sweden to work on the renovation of a school in Vaxholm. With an aim to avoid wage dumping in the building sector, Byggnads sought to extend the relevant sectoral collective agreement to the posted workers and negotiate wages for them. Laval, who had already signed a collective agreement with the Latvian building sector's trade union, refused. Byggnads responded by initiating a blockade of Laval's building sites. Laval brought an action in the Swedish courts, claiming that the blockade was in breach of Directive 96/71/EC (the Posted Workers Directive) and the freedom to provide services protected by Article 56 TFEU. Laval also argued that certain aspects of the Swedish law known as *Lex Britannia*, which reserved the mandatory social truce to agreements signed with Swedish trade unions, directly discriminated against foreign undertakings.

In both cases, the interpretation provided by the ECJ clearly went in favour of the employers' side. The Court thus let social policy objectives stand aside to the economic aim

¹ Kruse, A., *Fackliga stridsåtgärder och den fria rörligheten i EU*, ERT, no. 1, (2008), p. 187.

² Case C-438/05 *The international Transport Workers' Federation & The Finnish Seamen's Union v. Viking Line ABP & Oü Viking Line Eesti* [2007] ECR I-10779.

³ Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

of creating an internal market with no barriers to trade. The rulings were groundbreaking on several points. For instance, the ECJ not only subjected an alleged fundamental right to the Treaty provisions on free movement and made it conditional on the satisfaction of a strict proportionality test, but it also applied those provisions to private parties, i.e. trade unions. The judgements have caused intense debates among scholars as to their practical and legal scope. Consequently, *Viking* and *Laval* did not settle the conflict between the right to collective action and the freedom of movement once and for all. Rather, the rulings give rise to more than a few questions as to the legal scope of the Treaty provisions on free movement with regard to collective action, some of them which will be dealt with in this essay.

1.2 Purpose and research questions

Viking and *Laval* induced strong reactions from the European trade union movement, who expressed deep concerns that the judgments will lead to social dumping and a race to the bottom, as they seemingly reduces the possibility to protect the workforce by way of collective action from regulatory competition of Member States with low labour standards. However, one issue that is often overlooked is that these cases also entail that the precedents of Union law might even penetrate domains which so far for granted has been considered as internal matters of each Member State to decide upon. Since the ECJ chose not to exclude collective action from the scope of free movement, any such action, not only those aimed at battling low-wage competition, is now liable to become subject to the scrutiny of the ECJ. Given the Court's extremely broad interpretation of the cross-border criterion,⁴ it seems as if few actions will escape the ambit of free movement. If so, this would bring an entirely new dimension to national collective bargaining systems, as trade unions always would have to calculate with the disruption to inter-state trade that an action might cause and be prepared to justify it against public interests of the Union. In effect, trade unions in high-cost states may find themselves not simply undercut by lower standards in other countries, but unable even to initiate collective action on their national territory against domestic companies, as long as there is the slightest link to Union law.⁵

The aim of this essay is thus to provide a legal analysis of the scope of the *free movement of services* with regard to collective action, which, as opposed to the actions initiated in *Viking* and *Laval*, is *neither aimed at, nor has the effect of making cross-border service provision more difficult than national service provision*. For the sake of simplicity, I will refer to this as

⁴ See Chapter 2.1.3 below.

⁵ Deakin, S., Regulatory competition in Europe after *Laval*, Centre for Business Research, University of Cambridge Working Paper No. 364, (2008), p. 21.

non-discriminatory collective action, even though the concept of discrimination is a complex and arguably ambiguous one. To clarify which situations that will fall within the ambit of the given definition of non-discriminatory collective action, I will provide for a few examples. Imagine an ordinary wage strike against a service providing company with business in more than one Member State. Even though that company will be equally prevented from providing services in the home state the strike will in fact, so long as it lasts, bar the company from providing services in other Member States, thus seemingly constituting a restriction on the free movement of services. For instance, if the employee's of Laval in Latvia would have gone into strike, that company would have been hindered to provide services in Latvia as well as in Sweden. Or take a strike similar to that in *Viking* as an example, although with an aim to gain improved working hours instead of that to prevent a company from establishing itself in another Member State. Such a strike would in practice impede the company from providing services in the states covered by the vessel's route. Or, finally, picture a blockade against a subcontractor in a host state on whom a foreign operator providing services in that state is dependent. Since that blockade would obstruct the foreign operator's provision of services, it might amount to a restriction on Article 56 TFEU.

In order to attain the stated aim I will try to answer the following questions. Which criterion is applied to limit the scope of Article 56 TFEU, i.e. to identify a restriction on the free movement of services, and how does it relate to non-discriminatory collective action? When may Article 56 TFEU be applied horizontally to trade unions? Finally, how is the right to collective action to be reconciled with the freedom of movement?

1.3 Delimitations

My area of research will be Union law, not labour law. Consequently, I will solely examine the right to take collective action in a Union free movement context and not engage in an assessment of that right in relation to national labour laws. Furthermore, my main area of research will be delimited to the free movement of services. However, I will also study cases concerning the other freedoms insofar as they are relevant for interpreting Article 56 TFEU. Not least, analogies will be made from the freedom of establishment and the *Viking* case, as it provides for valuable guidance on how to assess collective action in relation to free movement. Finally, I will not analyze the application and implications of the Posted Workers Directive. The reason is twofold. Firstly, such an analysis would simply make the essay too voluminous and, secondly, collective action that brings the directive to the fore will most likely not be of a non-discriminatory character within the meaning of this essay and,

therefore, such action would for the most part fall outside the aim of this essay. Any further delimitation will be announced in connection to the relevant chapter.

1.4 Method and material

In order to answer my research questions I will use traditional legal method, i.e. the dogmatic one, which has as its main objective to interpret and systemize the legal situation in relation to a certain issue or area of law. Hence, I will engage in a *de lege lata* analysis of the scope of the free movement of services with regard to collective action, using the provisions of the Treaty and the jurisprudence of the ECJ as my point of departure. Apart from the case-law of the ECJ, I will to some extent examine the opinions of the Advocate Generals (AG). Even though the Court is not legally bound by those opinions, they are very influential and often shed light on the meaning of obscure judgments.⁶ Therefore, I find them useful tools for understanding and analyzing as well as outlining forthcoming tendencies in the case-law of the ECJ. Furthermore, in relation to the question of reconciling fundamental rights and freedoms, I will pay attention to judgments of the European Court of Human Rights (ECtHR). Like the opinions of the AGs, those judgments are not binding upon the Court, but can be useful in scrutinizing the reasoning of the ECJ, since the latter normally takes account of the precedents of the ECtHR.⁷ This means that when the meaning of a ruling of the ECJ that involves fundamental rights issues is unclear, there are reasons to believe that it is not intended to directly contradict judgements of the ECtHR addressing the same issue. In that sense, the latter can provide for some guidance on how to interpret such rulings of the ECJ. Finally, in order to penetrate the judgments of the Court and discern different possible interpretations, I will study academic literature encompassing textbooks and articles addressing the subject matter of this essay.

To understand my choice of material and the emphasis I put on the case-law of the ECJ it is significant to stress the crucial role that case-law plays as a legal source in Union law. Due to the vague and goal-oriented provisions of the Treaty and the lack of travaux préparatoires the judgements of the Court, whose interpretative activities sometimes can be described as close to that of law-making, has in many areas in practice become the main source of Union law.⁸ Therefore, my main focus will lie in interpreting and analyzing the meaning and consequences of those judgments for the subject-matter of this essay. To understand my

⁶ Craig, P. and de Búrca, G., *EU Law – Text, Cases and Materials*, (2008), p.70.

⁷ Tridimas, T., *The General Principles of EU Law*, (2006), p. 342 ff. See also Reich, N., *Fundamental Freedoms v. Fundamental Rights: Did Viking get it Wrong?* ERT, no. 4, (2008), p. 857.

⁸ Hettne, J. and Otken Eriksson, I. (Eds.), *EU-rättslig metod*, (2005), p. 30 and 89 f.

analysis one must be familiar with the Court's method of interpretation, which is generally described as teleological. This means that the Court tends to examine the whole context in which a particular provision is situated, and gives the interpretation most likely to further what the Court considers that provision sought to achieve.⁹ One must also understand that the Court is aware of the political environment in which it acts and that its judgments are sometimes influenced by relatively non-legal arguments relating to the potential financial or social impact of a ruling.¹⁰ Hence, my analysis is based on the assumption that the Court takes such teleological, contextual and, to some extent, political considerations. Therefore, it will encompass a critical review of how such considerations have influenced the rulings under scrutiny, notably *Viking* and *Laval*, and how they can be expected to influence the outcomes in cases of non-discriminatory collective action. I will also make some statements *de lege ferenda*, in the light of such considerations. In these respects, my method can be characterized as 'critically dogmatic'.¹¹

The Treaty was renamed, from the Treaty establishing the European Community (the EC Treaty) to its current name, and renumbered due to the entry into force of the Lisbon Treaty on 1 December 2009. I will consistently use the current name and numbers in relation to all cases and other materials. Hence, when quoting a text that refers to an article of the EC Treaty I will replace it for the corresponding one of the TFEU.

1.5 Disposition

This essay is structured as follows. The second chapter offers a brief overview of the basic legal concept of the free movement of services. Although this chapter will not directly address my research questions, it is in my view crucial for appreciating the analysis in the subsequent chapters. The third chapter deals with the question of how the scope of Article 56 TFEU is limited. In other words, it seeks to identify the relevant criteria for determining whether a restriction on the freedom to provide services is at hand. Such an examination is necessary in order to answer the question whether non-discriminatory collective action may fall within the scope of Article 56 TFEU, particularly since the role of the non-discrimination principle is far from clear. The fourth chapter examines the application of Article 49 and 56 TFEU to trade unions in *Viking* and *Laval*. The aim is to determine whether the Court's reasoning in those cases concerning horizontal direct effect can be extended to other types of collective action, in

⁹ Craig and de Búrca, p. 73 f.

¹⁰ *Ibid.*

¹¹ Sandgren, C., Vad är rättsvetenskap? Festschrift till Peter Seipel, (2006) p. 534 f.

particular to non-discriminatory ones. The fifth chapter is devoted to the conflict between fundamental freedoms and the fundamental right to collective action. I will, in the light of preceding case-law, critically analyze how the Court solved that conflict in *Viking* and *Laval* and try to appraise the general consequences of those judgements for future conflicts between those interests. Chapters four and five thus differ from chapter three in that those chapters engage in a careful analysis of the Court's reasoning in *Viking* and *Laval*, while chapter three is more concerned with the Court's general jurisprudence on how to identify a restriction on the freedom of movement. This is due to the Court's scarcity of reasoning in respect of this question in *Viking* and *Laval*; those cases do simply not provide a sufficient basis for outlining the limits of Article 56 TFEU. The essay will end with a discussion and overall conclusions in chapter six.

2. The free movement of services – an overview

The aim of this chapter is, as the heading suggests, to provide an overview of the Treaty provisions on free movement of services and the jurisprudence of the ECJ relating to those provisions. Consequently, I will not offer a detailed breakdown of each element of the concept of services, but briefly outline the legal background necessary to be acquainted with for the understanding of the analysis to follow.

2.1 The concept of services

The free movement of services is established in Article 56 and 57 of the Treaty, the former provision setting out a general prohibition on restrictions on the freedom to provide services and the latter defining the notion of services in the Treaty sense of the term. According to Article 56 TFEU, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a State of the Union *other* than that of the person for whom the services are intended. Article 57(1) TFEU provides that services shall be considered to be ‘services’ within the meaning of the Treaty where they are *normally provided for remuneration*, insofar as they are *not governed by the provisions relating to freedom of movement for goods, capital and persons*. It follows from these two provisions that the concept of services comprises four elements (1) the exercise of a service activity, (2) an inter-state element, (3) remuneration and (4) non-applicability of the other freedoms. In the following sections I will explicate these elements in turn. First, however, I will clarify the beneficiaries of Article 56, that is, who that article is aiming to protect.

2.1.1 Who can rely on Article 56 TFEU?

Since the ECJ delivered the ruling of *Van Binsbergen*, natural or legal persons can invoke Article 56 TFEU directly before the national courts of the Member States, as the provision was given direct effect.¹² In order to benefit from the Treaty provisions on services, the person must have the nationality of a Member State, which applies to natural as well as legal persons. The nationality of a legal person is defined in Article 54 TFEU as a company or firm formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union. If a company’s central

¹² Case 33/74 *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299 para. 27.

administration or principal place of business is located outside the EU, the company's activities must have a real and continuous link with the economy of a Member State.¹³

So which natural or legal persons with the nationality of a Member State can turn to the national courts in reliance of the Treaty provisions on services? As the wording of Article 56 and 57 TFEU indicates, *providers* of services can claim protection under the Treaty rules relating to services. Furthermore, the Court has accepted that certain persons may claim rights on behalf of the provider.¹⁴ Even though not expressly referred to in Article 56 TFEU, also *recipients* of services can rely on that article. This was initially established in *Luisi and Carbone* where the Court found that the freedom to receive services was the necessary corollary of the freedom to provide services and, consequently, that the freedom to provide services includes the freedom for the recipients to go to another Member State in order to receive a service there, without being obstructed by restrictions. Examples of persons that are to be regarded as recipients of services are tourists, persons receiving medical treatment and persons travelling for the purpose of education or business.¹⁵

2.1.2 The exercise of a service activity

Apart from the elements enumerated in section 2.1, the Treaty is relatively quiet in regard of what kinds of activities that may constitute services within the meaning of Article 56 TFEU. However, a few examples of such services are given in Article 57(2) and 58 TFEU, including activities of an industrial and economic character, activities of craftsmen and the professions and services within the field of transports.¹⁶ These were areas which, at the time of the establishment of the Treaty, were considered to be especially important to liberalize. But as technology has enhanced the mobility of persons and information an increasing number of activities have been exercised across the borders. This development is reflected in the case-law of the ECJ, which has expanded the list of services caught by Article 56 significantly. We have seen how diverse activities such as tourism,¹⁷ medical¹⁸ and financial¹⁹ activities, the transmission of a television signal,²⁰ debt collection work²¹ and sporting activities²² all

¹³ General Programme for the abolition of restrictions on freedom to provide services, OJ 002 , 15/01/1962, English special edition: Series II Volume IX.

¹⁴ See e.g. Case C-60/00 *Carpenter v. Secretary of State for the Home Department* [2002] ECR I-6279 in which the wife of a British national invoked the rights of her husband as a service provider.

¹⁵ Joined Cases 286/82 and 26/82 *Luisi and Carbone v. Ministero del Tesoro* [1984] ECR 377 paras 10 and 16.

¹⁶ Transport services are however, by reference in Article 58 TFEU, governed by the provisions relating to transports.

¹⁷ Joined Cases 286/82 & 26/83 *Luisi and Carbone*.

¹⁸ Case C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473.

¹⁹ Case C-384/93 *Alpine Investments BV v. Minister van Financiën* [1995] ECR I-1141.

²⁰ Case 155/73 *Giuseppe Sacchi* [1974] ECR 409.

constitute services. Not even the morally questionable character of an activity removes it from the scope of the free movement of services, provided that the service is lawful in another Member State. Hence, in *Grogan*²³, the Court declared that abortion, which was legal in several Member States, was a service within the meaning of the Treaty. Likewise, in *Schindler*,²⁴ the Court found that lotteries, despite their harmful nature, fell within the scope of Article 56 TFEU. Because of the Court's broad and inclusive interpretation of the Treaty provisions of Services, it seems as if few activities are excluded from their protection.²⁵

2.1.3 Inter-state element

As follows from the wording of Article 56 TFEU, a precondition for its application is a cross-border or inter-state element, the relevant criterion being that the provider and the recipient are established in different Member States. The cross-border element can thus be satisfied in three different ways (1) the provider of services travels to another Member State to provide services there, (2) the recipient travels to another Member State to receive services there and (3) the service itself travels by means of post or telecommunication.²⁶ The third situation was at hand in *Alpine Investment*, where a company was prohibited by their national authorities from cold-calling, i.e. from telephoning individuals in the Netherlands or in other Member States to offer them various financial services, without the prior written consent of the individuals concerned.²⁷ The Court held that Article 56 TFEU covers services which the provider offers by telephone to recipients established in other Member States and provides *without moving* from the Member State in which he is established.²⁸ This case demonstrates that the ECJ is focusing increasingly on the mobility and availability of the service in question rather than emphasizing the person, i.e. the provider or the recipient who is involved.²⁹ It should also be noted that the case concerned a *Dutch prohibition* which was challenged by a

²¹ Case C-3/95 *Reisebüro Broede v. Sandker* [1996] ECR I-6511.

²² Joined Cases C-51/96 & C-191/97 *Deliège* [2000] ECR I-2549.

²³ Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v. Grogan and others* [1991] ECR I-4685

²⁴ Case C-275/92 *Schindler* [1994] ECR I-1039.

²⁵ Barnard, C., *The substantive law of the EU – The four freedoms*, (2007), p. 360.

²⁶ St Clair Renard, S., *Fri förlighet för tjänster – tolkning av artikel 49 EGF*, (2007), (hereinafter St Clair Renard, (2007)) p. 34 f.

²⁷ Case C-384/93 *Alpine Investments*.

²⁸ *Ibid.*, paras 20-22.

²⁹ Craig and de Búrca, p. 817 f. See also case 352/85 *Bond van Adverteerders v. Netherlands* [1988] ECR 2085.

Dutch company. Hence, the case illustrates that Article 56 cannot only be invoked against the host state, but also against the *home state* in which the claimant is established.³⁰

The inter-state requirement thus excludes purely internal situations from the scope of the Treaty rules on services.³¹ However, due to the Court's broad interpretation of the cross-border criterion there seems to be few other situations that escape the prohibition in Article 56 TFEU as being purely internal.³² The case just mentioned, *Alpine Investments*, can serve as an example of this. The Court ruled that Article 56 does not require the prior existence of an identifiable recipient, but covers services which the provider offers to *potential* recipients established in other Member States.³³ This finding, that a potential cross-border element is sufficient for Article 56 to come into play, has been confirmed in later judgements e.g. in *Gourmet*.³⁴ A conclusion which can be drawn from these cases is that, as long as the business plan, the structure of the service provider and the nature of the services indicates that there is an intention and a material possibility to provide cross-border services, the situation will not be considered as purely internal.³⁵

Although the Court made a broad interpretation of the inter-state criterion in *Alpine Investments*, the perhaps most remarkable case in this regard is the *Carpenter* judgement.³⁶ The case concerned a Filipino woman who was to be expelled from the UK for having failed to comply with the domestic immigration requirements. Thus, no link to Union law seemed to exist. The Court, however, focused on the fact that Mr Carpenter, who ran a business selling advertising space in medical and scientific journals, was a service provider within the meaning of Article 56 TFEU, since many advertisers, i.e. potential service recipients, were established in other Member States. The Court concluded that since the deportation of his wife would be detrimental to their family life it would also be harmful to the conditions under which he exercised the freedom to provide services. Therefore, the deportation of Mrs Carpenter was deemed incompatible with Article 56 TFEU. By accepting such a tenuous link to Union law the ECJ has arguably, if not abandoned, at least gone a long way towards

³⁰ Case C-384/93 *Alpine Investments*, para. 30. See also Case C-18/93 *Corsica Ferries Italia v. Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783, para. 30 and Case C-381/93 *Commission v. France* [1994] ECR I-5145, para. 14.

³¹ However, in certain sectors such as public procurement and concession contracts, where harmonizing legislation has been adopted, the legislation is made applicable even to purely internal situations, see Craig & De Búrca, p. 818 and Hatzopoulos & Do, *The Case Law of the ECJ concerning the Free Provision of Services: 2000-2005*, CMLRev 43: 923-991, (2006), p. 945 f.

³² Barnard, p. 357.

³³ Case C-384/93 *Alpine Investments*, paras 19 and 22.

³⁴ Case C-405/98 *Konsumentombudsmannen v. Gourmet International Products* [2001] ECR I-1795, para. 35.

³⁵ Hatzopoulos & Do, p. 943 f.

³⁶ Case C-60/00 *Carpenter*.

eroding the principle that Union law does not apply to wholly internal situations in the field of services.³⁷

2.1.4 Remuneration

The requirement of remuneration means that a service has to be of a commercial or economic nature to fall within the scope of Article 56 TFEU. The essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service.³⁸ However, as the Court made clear in *Bond*, remuneration does not need to flow directly from the recipient of the service to the provider, so long as the service is to be paid for by some party.³⁹

The requirement of remuneration was introduced to avoid public service tourism, i.e. to prevent persons from countries with a low tax rate and poor public services to travel to a country with high taxes and take advantage of the ensuing good public services of the latter state. Some public services are thus disqualified as services in the Treaty sense of the term.⁴⁰ Hence, the Court ruled in *Humbel* that courses taught under the national educational system of Belgium did not constitute services for the purposes of Article 56 TFEU.⁴¹ The Court based this finding on the fact that the State was not seeking to engage in gainful activity but was fulfilling its duties towards its own population in the social, cultural and educational fields, and that the system was generally funded from the public purse and not by pupils or their parents.⁴² Following the logic of this decision, the ECJ held in *Wirth* that, although most institutions of higher education were financed from public funds, those which were financed out of private funds and sought to make a profit, were aiming to offer services for remuneration within the meaning of Article 57(1) EC.⁴³ Although not completely abandoned, the logics from *Humbel* and *Wirth* have been restricted significantly by subsequent cases concerning access to cross-border health-care. In *Geraets-Smits and Peerbooms*⁴⁴ and *Vanbraekel*⁴⁵ it was settled that medical treatment in a hospital amounts to services. In the former case several Member States claimed, in reliance on the *Humbel* case, that hospital services did not constitute an economic activity when provided free of charge under a

³⁷ Barnard, p. 261 and 357

³⁸ Case 263/86 *Belgian State v. Humbel* [1988] ECR 5365, para. 17.

³⁹ Case 352/85 *Bond van Adverteerders*, para. 16.

⁴⁰ Snell, J., *Goods and Services in EC Law – A Study of the Relationship Between the Freedoms*, (2002), p. 13.

⁴¹ Case 263/86 *Humbel*, para. 20.

⁴² *Ibid.*, para. 18.

⁴³ Case C-109/92 *Stephan Max Wirth v. Landeshauptstadt Hannover* [1993] ECR I-6447, para. 15-17.

⁴⁴ Case C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473.

⁴⁵ Case C-368/98 *Vanbraekel and Others v. ANMC* [2001] ECR I-5363.

sickness-insurance scheme.⁴⁶ The ECJ disagreed and held that the payments made by the sickness insurance funds under the contractual arrangements between the funds and the hospitals, albeit set at a flat rate, were indeed the consideration for the hospital services and unquestionably represented remuneration for the hospital which received them. In addition, the Court declared that a medical service provided in one Member State and paid for by the patient should not cease to fall within the scope of the freedom to provide services guaranteed by the Treaty merely because reimbursement of the costs of the treatment involved is applied for under another Member State's sickness insurance legislation.⁴⁷ This reasoning was confirmed and extended in *Müller-Fauré*⁴⁸ and *Watts*.⁴⁹ In contrast to the previous cases, *Watts* concerned a tax-funded health-care system instead of an insurance-based one. Nevertheless, the Court found that Article 56 TFEU applied to the situation.⁵⁰ The conclusion to be drawn from these cases is that there is no exception from the prohibition in Article 56 for state-provided welfare services. Whether the particularly broad interpretation of the remuneration condition in the health-care cases will spill over to other state-provided welfare services remains, however, to be seen.

2.1.5 Non-applicability of the other freedoms

Article 57(1) TFEU defines services negatively as not being covered by the Treaty rules concerning free movement of goods, persons and capital. The free movement of services thus seems to be residual vis-à-vis the other freedoms. Correspondingly, the Court stressed in *Gebhard* that the Treaty chapters on the free movement of workers, the right of establishment and services are mutually exclusive and that the provisions of the chapter on services are subordinate to those of the chapter on the right of establishment.⁵¹ On the other hand, in regard of goods and capital, the Court has held that the purpose of the negative definition of services is merely to ensure that no economic activity falls outside the scope of the fundamental freedoms and, therefore, does not establish any order of priority between the freedom to provide services and the other fundamental freedoms. Instead, where a national measure restricts both the free movement of goods/capital and the freedom to provide service, the Court will consider whether one freedom prevails over the other. The Court will then in

⁴⁶ Case C-157/99 *Geraets-Smits and Peerbooms*, paras 48-49.

⁴⁷ Case C-157/99 *Geraets-Smits and Peerbooms*, paras 55 and 58.

⁴⁸ Case C-385/99 *V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA* [2003] ECR I-4509.

⁴⁹ Case C-372/04 *Watts v. Bedford Primary Care Trust* [2006] ECR I-4325.

⁵⁰ *Ibid.*, para. 90.

⁵¹ Case C-55/94 *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para. 20.

principle examine the measure in dispute in relation to only one of the two freedoms if it appears that one of them is entirely secondary in relation to the other and may be considered together with it.⁵² Accordingly, the main principle, at least as regards collisions between goods/capital and services, is that only one freedom should be applied and the criterion for determining which one is prevalence.⁵³ Examples of how the Court has applied this criterion will be provided in sections 2.1.5.3 and 2.1.5.4.

2.1.5.1 Services – establishments

The borderline between the free movement of services and the other freedoms can sometimes be difficult to draw. The perhaps most tenuous delineation is that between the freedom to provide services and *the freedom of establishment*, as the two liberties are closely related. Both freedoms concern self-employed persons or companies who pursue economic activities in another Member State.⁵⁴ The distinction is nevertheless important, since a natural or legal person regarded as established will be burdened with all the national rules for establishment in the host state.⁵⁵ So how is the borderline between services and establishments to be drawn? Article 57(3) TFEU stipulates that, without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may *temporarily* pursue his activity in the State where the service is provided. The key distinction is thus that, while establishments are stable and continuous, services are pursued on a temporary basis.⁵⁶ In *Gebhard* the Court held that the temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity. The mere fact that the service provider equips himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) does not make him established there.⁵⁷ Correspondingly, the Court stressed in *Schnitzer* that services within the meaning of the Treaty may cover services varying widely in nature, including services which are provided over an extended period, even over several years.⁵⁸ However, the freedom to provide services does not reach so far as to activities carried

⁵² Case C-390/99 *Satelite Canal Digital SL v. Administración General del Estado, and Distribuidora de Televisión Digital SA* [2002] ECR I-607, para. 31; Case C-20/03 *Burmanjer and Others* [2005] ECR I-4133, paras 33-35 and Case C-452/04 *Fidium Finanz v. Bundesanstalt für Finanzdienstungsaufsicht* [2006] ECR I-9521, paras 30-34.

⁵³ St Clair Renard, (2007), p. 46.

⁵⁴ Hatzopoulus and Do, p. 951 f.

⁵⁵ Kaczorowska, A., European Union Law, (2009), p. 657.

⁵⁶ *Ibid.*, p. 32.

⁵⁷ Case C-55/94 *Gebhard*, para. 27.

⁵⁸ Case C-215/01 *Schnitzer* [2003] ECR I-14847, para. 30.

out on a permanent basis, or at least without a foreseeable limit to its duration. Such activities will instead be dealt with under the provisions on the freedom of establishment.⁵⁹

2.1.5.2 Services – workers

Contrary to the relationship between services and establishment, the borderline between services and the free movement of workers is relatively clear. Unlike service providers, workers do not engage in independent activities, but perform their activities under the direction of another person.⁶⁰ Still, there are a few cases where there has been some confusion on which freedom to apply, namely those regarding posted workers.⁶¹ However, the matter has been clarified by the ECJ which repeatedly has held that workers employed by a business established in one Member State who are temporarily sent to another Member State to provide services do not, in any way, seek access to the labour market in that second State if they return to their country of origin or residence after completion of their work. Therefore, such situations are to be treated under the rules on services and not under those on workers.⁶²

2.1.5.3 Services – goods

The freedom to provide services as well as the *free movement of goods* deals with products which can be subject to inter-state trade. However, there is a crucial difference in that services are non-material results of human performances, while goods are material objects.⁶³ This distinction might seem clear. Nevertheless, the border between the two freedoms has not always been easy to draw, since services are often part of the goods production and vice versa. In such cases, as mentioned above, the ECJ endeavours to apply only the prevailing one of the two freedoms. Thus, in *Schaijk*, the Court only examined the contested measure, by which test certificates for vehicles were reserved to domestic garages, under Article 56 TFEU, despite the fact that servicing of vehicles involved supply of goods such as spare parts and oil.⁶⁴ The Court declared in this respect that such a supply is *not an end in itself*, but is

⁵⁹ Case C-456/02 *Trojani v. Centre public d'aide sociale de Bruxelles* [2004] ECR I-7573, para. 28.

⁶⁰ Hatzopoulus and Do, p. 951 f.

⁶¹ A posted worker is defined in 'Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services,' Article 2(1), as a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.

⁶² Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, para. 15; C-43/93 *Vander Elst v. Office des Migrations Internationales* [1994] ECR I-3803, para. 21 and Joined Cases C-49/98, C-50/98, C-52-54/98 and C-68-71/98 *Finalarte Sociedade Construção Civil v. Urlaubs- und Lohnausgleichskasse der Bauwirtschaft* [2001] ECR I-7832, paras 22-23.

⁶³ St Clair Renard, (2007), p. 46 f.

⁶⁴ Case C-55/93 Criminal Proceedings Against J G C van Schaijk [1994] ECR I-4837.

incidental to the provision of services and was, consequently, to be treated under those.⁶⁵ Likewise, in *Schindler*, the importation and distribution of letters, promotional leaflets and lottery tickets was not considered as ends in themselves in relation to lottery activities, but simply as specific steps in the organization or operation of those activities.⁶⁶ Therefore, the contested measure was only examined in relation to the Treaty provisions on services. The same logics were applied in *Karner* where a company, engaged in the sale of industrial goods and the purchase of the stock of insolvent companies, was prohibited from referring to the fact that the goods originated from an insolvent estate in their advertising.⁶⁷ Since the dissemination of advertising was not an end in itself, but a secondary element in relation to the sale of the goods in question, the restriction was solely considered in the light of Article 34 TFEU.⁶⁸ It follows that the Court generally determines the prevalence criterion by reference to the main end of the concerned company's business activities.

In spite of the main principle stipulating that a measure should only be dealt with under one freedom, there are cases where both freedoms will apply. When studying the case-law of the ECJ one can outline two such situations. Firstly, where the *economic activity* involved is such that it is impossible to establish a hierarchy between goods and services and, secondly, where the *contested measure* is such as to simultaneously restrict both the free movement of goods and services.⁶⁹ Cases in the field of telecommunications provide examples of the first situation. While the transmission of television signals as well as installation of telecommunication equipment falls within the Treaty rules relating to services, the supply of material such as films and other products is covered by the provisions on goods.⁷⁰ The second situation is illustrated by the *Gourmet* case, which concerned a total ban on the advertisement of alcoholic beverages.⁷¹ The Court found that, in so far as the prohibition hindered producers and importers from marketing and selling their products, it was to be treated under the rules on goods, while, inasmuch as it hindered press undertakings to offer advertising space in their publications it fell within the Treaty provisions on services.⁷²

⁶⁵ *Ibid.*, para 14.

⁶⁶ Case C-275/92 *Schindler*, para. 22.

⁶⁷ Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [2004] ECR I-3025.

⁶⁸ *Ibid.*, para. 47.

⁶⁹ Hatzopoulos and Do, p. 950.

⁷⁰ Case 155/73 *Sacchi*, paras 6-7 and Case C-390/99 *Satellite Canal Digital*, paras 32-33.

⁷¹ C-405/98 *Gourmet*.

⁷² *Ibid.*, paras 19-20 and 38-39.

2.1.5.4 Services – capital

As to the relationship between services and *capital*, the distinguishing feature is whether the activity involved constitutes a capital movement or a service activity. There is no definition in the Treaty of the notion of capital movements. It is, however, settled case-law that the nomenclature annexed to Directive 88/361 has an indicative value, for the purposes of defining the notion of capital movements within the Treaty sense of the term.⁷³ The nomenclature lists inter alia direct investments, operations in securities, financial loans and credits and transfers in performance of insurance contracts. Consequently, the directive contains a number of activities which could also be regarded as services within the meaning of Article 56 TFEU. So which rules apply? This question was referred to the Court in *Fidium Finanz*, which concerned requirements of prior authorization for the granting of credit on a commercial basis.⁷⁴ The Court held that such activities concern, in principle, both the freedom to provide services within the meaning of Article 56 TFEU and the free movement of capital within the meaning of Article 63 TFEU. That said, the Court concluded that the impediment on the capital movements was merely an unavoidable consequence of the restriction on the freedom to provide services and, thus, that it was not necessary to consider whether the rules were compatible with Article 63 TFEU.⁷⁵ The ECJ thus applied the main principle and dealt with the contested measure under only one freedom, i.e. the prevailing one. However, the ruling does not reveal which factors that was determinative for the choice to apply the Treaty provisions on services instead of those relating to capital. Consequently, the need for clarification remains.

2.2 Restrictions on the free movement of services

While the previous sections have clarified which persons and activities that enjoy protection under the Treaty provisions relating to services, the following sections will shed light on the types of measures that may constitute restrictions on the freedom to provide services.

An absolute prerequisite for the realization of the common market is that no EU citizen is discriminated on the ground of nationality. This general principle of non-discrimination is established in Article 18 TFEU, which provides that any discrimination on grounds of nationality shall be prohibited. The consequence of this approach is that a person in a situation

⁷³ Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, para. 21; Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C 540/99 *Reisch and Others* [2002] ECR I-2157, para. 30 and Case C-513/03 *Van Hilten-van der Heijden v. Inspecteur van de Belastingdienst* [2006] ECR I-1957, para. 39.

⁷⁴ Case C-452/04 *Fidium Finanz*.

⁷⁵ *Ibid.*, paras 43 and 48-49.

governed by Union law will enjoy so called national treatment, or, in other words, will be placed on a completely equal footing with nationals of the host Member State.⁷⁶ The principle is central to the free movement provisions, since they constitute specific applications of the general prohibition of discrimination, which, with regard to services, is evident from Article 57(2). For long, the principle has been determinative as to which measures that should be considered as restrictions within the meaning of Article 56 TFEU. Thus, the ECJ has confirmed that the Treaty provisions on services entail the abolition of all discrimination, whether *direct* or *indirect*, on the ground of nationality.⁷⁷ However, in more recent years, the Court has gone beyond the non-discrimination approach and applied Article 56 TFEU even to measures that are neither directly, nor indirectly discriminatory, but which nevertheless are considered to impede the free movement of services.⁷⁸

Before looking any deeper into these different forms of restrictions, a reservation must be made with regard to the classification of the different forms of restrictions used below. That classification is by no means self-evident and the line of demarcation between those forms is in practice far from being entirely clear. The judgements of the ECJ are often ambiguous on this point and its terminology is not consistent. Therefore, that classification can be disputed, but I have chosen the one which seems to be most commonly used in doctrine and which in my view is most adequate for analysing the case-law of the ECJ.⁷⁹ It should also be noted that the ECJ frequently uses a generic term for indirectly and non-discriminatory restrictions, namely *indistinctly applicable measures*.⁸⁰ Consequently, this classification is far from always upheld by the Court.

2.2.1 Direct discrimination

Direct discrimination means that nationality is the clear and overt distinguishing factor, that is, that national rules or administrative measures explicitly treat persons of other nationalities differently.⁸¹ Therefore, direct discrimination is sometimes also referred to as *distinctly applicable measures*.⁸² Such measures may take various forms, from the prohibiting of foreign service providers to pursue certain activities to the setting up of less favourable

⁷⁶ Case 186/87 *Cowan v. Trésor public* [1989] ECR 195, para. 10.

⁷⁷ See e.g. Joined Cases 62 & 63/81 *Seco v. EVI* [1982] ECR 223, para. 8 and Case C-224/97 *Ciola v. Land Vorarlberg* [1999] ECR I-2517, para. 13.

⁷⁸ Barnard, p. 254 f.

⁷⁹ See e.g. Craig and de Búrca, p. 831; St Clair Renard, (2007) p. 84 ff and Barnard, p. 254 ff.

⁸⁰ However, indirectly discriminatory measures relating to residence and language are usually not included in this term.

⁸¹ St Clair Renard, (2007) p. 93.

⁸² Szyszczak, E. and Cygan, A., Understanding EU Law, (2008), p. 189.

conditions for foreign services. Naturally, the cases where such restrictions are involved are relatively few and the main question in those cases has rather been whether the service at issue falls within the scope of Article 56 TFEU, than whether the measure is discriminatory.⁸³ One such case is the *Cowan* ruling, where French law made the grant of criminal compensation to foreigners subject to the condition that they resided on French territory - a condition which was not imposed on the State's own nationals.⁸⁴ Given the apparently discriminatory character of the rule at issue, the main focus was instead on the question whether Mr Cowan could be regarded as a service recipient. Other examples of direct discrimination from case-law is the Italian refusal to allow foreigners to purchase or lease housing built or renovated with the aid of public funds or to obtain reduced-rate mortgage loans,⁸⁵ or the Spanish system whereby solely Spanish citizens benefited from free admission to national museums, while nationals of other Member States more than 21 years of age were required to pay an entrance fee.⁸⁶

2.2.2 Indirect discrimination

Indirect discrimination was defined by the ECJ in *Seco* as all forms of covert discrimination which, although based on criteria which appear to be nationality-neutral, in practice lead to the same result as direct discrimination.⁸⁷ It follows that, while direct discrimination imposes different burden in law, indirect discrimination entails different burden in fact.⁸⁸ This is the result when similar situations are treated differently or when different situations are treated similarly.⁸⁹ The most obvious form of indirect discrimination is when national rules impose requirements associated with that of nationality, such as requirements concerning residence⁹⁰ and language.⁹¹ As regards the former requirement, the Court has held that it has the result of depriving Article 56 TFEU of all useful effect, in view of the fact that the precise object of that article is to abolish restrictions imposed on persons who are *not* established or habitually residing in the state where the service is to be provided.⁹² However, there are other more subtle forms of indirect discrimination, e.g. requirements as to holding particular licenses⁹³ or

⁸³ St Clair Renard, (2007), p. 94.

⁸⁴ Case 186/87 *Cowan*.

⁸⁵ Case 63/86 *Commission v. Italy* [1988] ECR 29.

⁸⁶ Case C-45/93 *Commission v. Spain* [1994] ECR I-911.

⁸⁷ Joined Cases 62 & 63/81 *Seco*, para. 8.

⁸⁸ Barnard, p.256.

⁸⁹ Snell, p. 27.

⁹⁰ See e.g. Case 33/74 *Van Binsbergen* and Case C-224/00 *Commission v. Italy* [2002] ECR I-2965.

⁹¹ Case 379/87 *Groener v. Minister for Education* [1989] ECR 3967.

⁹² Case 33/74 *Van Binsbergen*, para. 11.

⁹³ Joined cases 110 & 111/78 *Ministère Public v. Van Wesemael* [1979] ECR 35.

to pay certain fees.⁹⁴ These rules give rise to discrimination because the requirements create a *double burden* on migrants who have to satisfy two sets of rules, both those of the host and the home Member State.⁹⁵ Consequently, the problem does not lie with the rule itself but with the application of the rule to a service coming from another Member State which has a different rule.⁹⁶ One example of this is found in *Vander Elst* where the employment of nationals of non-member states was subject to the payment of a fee to an immigration authority. The Court held that, since undertakings established in another Member State was already liable for the same periods of employment to pay similar fees in the State in which they are established, the fee at issue proved financially to be more onerous for those employers, who in fact had to bear a heavier burden than those established within the national territory.⁹⁷ Although in this case the double burden was evident, there are cases where the double burden is more difficult to spot. One such case is *De Agostini* which concerned a Swedish prohibition on advertising designed to attract the attention of children less than 12 years of age. It might seem as if a prohibition, which applied to undertakings established within as well as outside the Member State, would be considered as equally burdensome.⁹⁸ However, the Court found that the prohibition constituted a restriction on Article 56 TFEU insofar as the foreign service providers already had to satisfy advertising requirements of their home State's legislation.⁹⁹ In this case, the double burden approach seems rather contrived and, arguably, the Court could instead have treated the measure as a genuinely non-discriminatory one, as it did the advertising prohibition in *Gourmet*.¹⁰⁰

2.2.3 Non-discriminatory measures

Following the trend in the field of free movement of goods,¹⁰¹ the ECJ brought, in the 1990s, genuinely non-discriminatory measures within the scope of the Treaty provisions on services. The starting point was the *Säger* judgment, which concerned German legislation reserving activities related to the maintenance of industrial property rights to patent agents.¹⁰² The Court declared that Article 56 TFEU requires *not only the elimination of all discrimination* against a person providing services on the ground of his nationality *but also the abolition of any*

⁹⁴ Case C-43/93 *Vander Elst*.

⁹⁵ Barnard, p. 256.

⁹⁶ Snell, p. 27.

⁹⁷ Case C-43/93 *Vander Elst*, para. 15.

⁹⁸ Joined Cases C-34-36/95 *Konsumentombudsmannen v. De Agostini* [1997] ECR I-3843.

⁹⁹ *Ibid.*, para. 51.

¹⁰⁰ Case C-405/98 *Gourmet*, para. 39.

¹⁰¹ See e.g. Case 145/88 *Torfaen BC v. B & Q plc* [1989] ECR 3851.

¹⁰² Case C-76/90 *Säger v. Dennemeyer & Co. Ltd.* [1991] ECR I-4221.

*restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.*¹⁰³ This mantra has been repeated by the ECJ in numerous cases, although with slight changes or amendments in the terms of expression. Thus, in *Arblade*¹⁰⁴ and *Mazzoleni*,¹⁰⁵ the Court added the *rendering of the provision of cross-border services less advantageous or less attractive* to the list.¹⁰⁶ In *Alpine Investments*, the ECJ held that the Dutch prohibition on cold-calling *directly affected access to the market* in services in the other Member States and was therefore capable of hindering intra-Union trade in services.¹⁰⁷ In *Gourmet*, the Court stressed that the Swedish advertising ban on alcoholic beverages, even if not discriminatory, had a *particular effect on the cross-border supply* of advertising services.¹⁰⁸ Despite the difference in the terms of expression, a common conclusion can be drawn from these cases, namely that a regulation will not fall outside the scope of Article 56 TFEU simply because it is genuinely non-discriminatory in law and in fact, unless it also does not in any way affect the access to the Market of another Member State.¹⁰⁹

2.3 Justifying restrictions on the free movement of Services

The fact that a national measure has been found to constitute a *prima facie* restriction on the free movement of service does not necessarily mean that it is incompatible with that freedom. The interests of free movement cannot automatically override the interest protected by the national measure, since that measure may be aimed to shield interests which, as well as free trade, are public interest goals of the Union and thus protected by the Treaty.¹¹⁰ The Member State may therefore try to justify the measure either under the Treaty exceptions or under a broader category of exceptions developed by the ECJ, usually referred to as imperative requirements in the public interest.¹¹¹ It should be noted, however, that a measure cannot be justified when there is *harmonising EC legislation*, already satisfying the alleged goals in the area concerned.¹¹²

¹⁰³ *Ibid.*, para. 12.

¹⁰⁴ Joined Cases C-369 and 376/96 *Arblade and Others* [1999] ECR I-8453, para. 33.

¹⁰⁵ Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, para. 22.

¹⁰⁶ See also e.g. Case C-272/94 *Guiot* [1996] ECR I-1905, para. 10 and Case C-49/98 *Finalarte*, para. 28.

¹⁰⁷ Case C-384/93 *Alpine Investments*, para. 38.

¹⁰⁸ C-405/98 *Gourmet*, para. 39.

¹⁰⁹ Craig & de Búrca, p. 833.

¹¹⁰ Snell, p. 171.

¹¹¹ Craig & de Búrca, p. 826 f.

¹¹² See e.g. Case C-158/96 *Kohll* paras 45-49.

2.3.1 Treaty exceptions

The Treaty exceptions to the free movement of services are found in Article 51 and 52 in the chapter relating to establishments, but are, by reference from Article 62, extended to cover the field of services. These express derogations may be relied upon in order to justify distinctly as well as indistinctly applicable measures. In other words, they even cover situations of direct discrimination.¹¹³

Article 51 TFEU provides for the so called official authority exception, which excludes activities connected with the use of official power from the Treaty provisions on services. The Court has interpreted the exception narrowly and rejected activities such as those of an *avocat*, even when involving compulsory co-operation with the courts,¹¹⁴ the post of commissioner of insurance companies¹¹⁵ and private security activities¹¹⁶ from its scope of application.

Article 52 TFEU enumerates public policy, public security and public health as grounds for justifying restrictions on the free movement of services. Like the official authority exception, these grounds have also been interpreted restrictively by the Court, particularly that on public policy. The Court has held in this regard that the recourse by a national authority to the concept of public policy presupposes a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.¹¹⁷

2.3.2 Judicially created exceptions

In addition to the express derogations in the Treaty, the ECJ has in its case-law developed a justificatory test similar to the *Cassis de Dijon*¹¹⁸ ‘rule of reason’ in the free movement of goods context. While in the area of goods the test is usually referred to as mandatory requirements, the terms imperative requirements or objective justification is generally used in the field of services.¹¹⁹ The origins of this approach in the service context are found in *Van Binsbergen*¹²⁰ and were further developed in *Säger*¹²¹. In the latter case the court confirmed that the freedom to provide services may be limited by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing

¹¹³ Bernitz, U. and Kjellgren, A., *Europarättens grunder*, (2007), p. 262.

¹¹⁴ Case 2/74 *Reyners v. Belgium* [1974] ECR 63.

¹¹⁵ Case C-42/92 *Thijssen v. Controledienst voor de Verzekeringen* [1993] ECR I-4047.

¹¹⁶ Case C-283/99 *Commission v. Italy* [2001] ECR I-4363.

¹¹⁷ Case 30/77 *Régina v. Bouchereau* [1977] ECR 1999, para. 35.

¹¹⁸ Case 120/78 *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

¹¹⁹ *Craig & de Búrca*, p. 826 f.

¹²⁰ Case 33/74 *Van Binsbergen*.

¹²¹ Case 76/90 *Säger*.

an activity in the State of destination, in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established. In particular, those requirements must be objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services and they must not exceed what is necessary to attain those objectives.¹²² It follows from this statement that a number of conditions have to be satisfied if a restriction on the freedom to provide services is to be compatible with Article 56 TFEU. *First*, the restriction must be adopted in the pursuit of a *legitimate public interest*. The list of interests accepted by the ECJ as legitimate is long and includes various grounds such as cohesion of the tax system,¹²³ prevention of unfair competition,¹²⁴ consumer protection,¹²⁵ preservation of the financial balance of the social security system,¹²⁶ prevention of fraud,¹²⁷ preservation of national historical and artistic heritage,¹²⁸ protection of creditors,¹²⁹ and, more importantly for the purposes of this essay, protection of workers,¹³⁰ and fundamental rights.¹³¹ It is for the national courts to objectively settle whether the rules in question promote a legitimate aim, although the ECJ retains the ultimate role of determining the legitimacy of the aim.¹³²

Secondly, the restriction must be *indistinctly applicable*. This means that, contrary to the derogations expressly mentioned in the Treaty, the imperative requirements may only be relied upon in order to justify measures which are either indirectly or non-discriminatory.¹³³

Thirdly, the restriction must be *proportionate* to the need to observe the legitimate interest. The proportionality test involves two or sometimes three steps. In the first step it is examined whether the rule in question is suitable or appropriate in achieving its objectives. This is a matter of causality, meaning, that the measure must actually be capable of attaining its purported objectives. The purpose of the suitability requirement is to prevent Member States from adopting rules that allegedly aim to protect a general interest but in reality have a

¹²² *Ibid.*, para. 15.

¹²³ Case C-204/90 *Bachmann v. Belgian State* [1992] ECR I-249.

¹²⁴ Joined Cases C-34 to 36/95 *De Agostini*.

¹²⁵ Case 205/84 *Commission v. Germany* [1986] ECR 3755.

¹²⁶ Case C-157/96 *Kohll v. Union des caisses de maladie* [1998] ECR I-1931.

¹²⁷ Case C-275/92 *Schindler*.

¹²⁸ Case C-180/89 *Commission v. Italy* [1991] ECR I-709.

¹²⁹ Case C-3/95 *Reisebüro Broede*.

¹³⁰ Joined Cases C.369/96 and C.376/96 *Arblade and Others*, para. 36; Case C.165/98 *Mazzoleni*, para. 27; Joined Cases C.49/98, C.50/98, C.52/98 to C.54/98 and C.68/98 to C.71/98 *Finalarte*, para. 33; Case C.438/05 *Viking*, para. 77 and Case C-341/05 *Laval*, para. 103.

¹³¹ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, para. 35.

¹³² Craig & de Búrca, p. 828.

¹³³ Barnard, p. 378.

protectionist purpose.¹³⁴ In the second step, it is determined whether or not the rule exceeds what is necessary to attain those objectives, or in other words, whether the aim could be satisfied by other, less restrictive means. This is the step which Member States most often fail to fulfil. One example is found in the so called *German insurance case*, where the requirement that insurers had to be established in Germany was not considered as necessary in order to protect the policy holders.¹³⁵ Another important aspect of the necessity test, emanating from the principle of mutual recognition, is that the requirements of another Member State may not be duplicated. It follows that if the provider is subject to safeguarding conditions in the home State, the host State cannot justify the imposition of similar conditions.¹³⁶ The third step is the test of proportionality *strictu sensu*, which entails the balancing of the national rule against the Union interest in free trade. Under this test national rules pursuing a legitimate aim can be found to infringe the free movement of services if their effect on trade is deemed excessive.¹³⁷ The clearest example of the proportionality *strictu sensu* approach was provided by Advocate General Van Gerven in his Opinion in *Grogan*. Van Gerven held that even if the national rule is useful and indispensable in order to achieve the aim sought, the Member State must nevertheless drop the rule, or replace it by a less onerous one, if the restrictions caused to intra-Union trade are disproportionate, that is to say if the restrictions caused are out of proportion to the aim sought by or the result brought about by the national rules.¹³⁸ However, in more recent case-law, the Court has been reluctant to engage in proportionality reviews *strictu sensu*, arguably because of the controversial nature of the test, which empowers the Union vis-à-vis Member States and has a centralising character.¹³⁹

¹³⁴ Snell, p. 196 ff.

¹³⁵ Case 205/84 *Commission v. Germany*, paras 52-56.

¹³⁶ Craig & de Búrca, p. 828; Snell, p. 199 and Kaczorowska, p. 690.

¹³⁷ Snell, p. 200.

¹³⁸ The Opinion of AG Van Gerven, in Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v. Grogan and others* [1991] ECR I-4685, para. 27 .

¹³⁹ Snell, p. 201 ff.

3. Limiting the Scope of Article 56 TFEU – which criterion applies?

To return to one of the introducing examples – an ordinary wage strike against a service providing company with business in other Member states – it might at first sight appear as if the question whether such an action may *prima facie* falls within the scope of Article 56 TFEU is already settled. As follows from the review in Chapter two, the inter-state criterion is remarkably broad and does not require the prior existence of an identifiable recipient. Consequently, it seems sufficient that the service provider generally pursues business in other Member States for that criterion to be satisfied. Furthermore, a provider can rely on Article 56 TFEU against the host state as well as the home state, and, last but not least, no discrimination is required. However, the question is not quite that simple. If Article 56 TFEU is thought to apply to all national regulations restricting the volume of trade, almost any national measure can be caught by it, since nearly all rules are capable of having an adverse effect on the supply and demand of services.¹⁴⁰ Consequently, in order to avoid such an inflated interpretation of Article 56 TFEU, there must be some criteria for limiting the scope of application. Different models have been suggested by scholars. First, it has been argued that the non-discrimination principle still has a say in the matter.¹⁴¹ Second, comparisons have been made to goods and the *keck* doctrine where the effect on market access is determinative.¹⁴² It follows, that in order to answer the question whether non-discriminatory collective actions may be caught by the prohibition in Article 56 TFEU, it has to be determined which one, if any, of these models that applies. Although there are other suggestions on how to limit the scope of application, I will in this chapter confine myself to examine two models, simply the ones which in my view have the strongest support in the jurisprudence of the ECJ. As to my selection of cases, I have chosen to present those which by some means can be held either to falsify or verify the examined models.

¹⁴⁰ Snell, J. and Andenas, M., Exploring the Outer Limits: Restrictions on Free Movement, in Andenas, M. and Roth, W-H., (Eds.), *Services and Free Movement in EU Law*, (2002), p 84.

¹⁴¹ See e.g. St Clair Renard, (2007) p. 77 ff. and Roth, W-H., *The European Court of Justice's Case Law on Freedom to Provide Services: Is Keck Relevant?* in Andenas, M. and Roth, W-H., (Eds.), *Services and Free Movement in EU Law*, (2002), p. 15 ff.

¹⁴² See e.g. Barnard, p. 262 ff; Weatherill, *After Keck: Some thoughts on how to clarify the clarification*, CMLRev 33: 885-906, (1996); Edward, D. and Shuibhne, N.N., *Continuity and Change in the Law Relating to Services*, in Arnall, A., Eeckhout, P. and Tridimas, T., (Eds.) *Continuity and Change in EU Law*, (2008), p. 253 ff

3.1 Discrimination and a differentiated interpretation of Article 56 TFEU

It is today beyond questioning that Article 56 TFEU does not solely constitute a prohibition on discrimination, as this fact was definitely established in *Säger* and has been confirmed on numerous occasions since.¹⁴³ However, it has been argued that Article 56 TFEU is to be interpreted differentially and in some situations be confined to a prohibition on discrimination and in others entail the abolition of all restrictions. The differentiated interpretation model is based on a partition of the scope of application of Article 56 TFEU into three categories: The service activity, service associated legal areas and rights of providers and recipients.¹⁴⁴ The actual *service activity* constitutes the core scope of application of the Treaty provisions on services and is simply an activity as defined in Article 56 and 57 TFEU, namely an economic cross-border activity, with temporary or no physical residence in the host state. Restrictions relating to the service activity are measures which directly regulate the conditions under which the service may be provided, e.g. authorization requirements, specific demands on organizational structure and regulations connected to product quality and professional qualifications. It is mainly in this field that the Court's dynamic and extending interpretation of Article 56 TFEU has taken place.¹⁴⁵ Hence, the model suggests that, in regard of measures relating to the actual service activity, Article 56 TFEU is to be interpreted as a prohibition of all restrictions, discriminatory as well as non-discriminatory.¹⁴⁶ *Service associated legal areas* are parts of the law which does not directly regulate the provision of services, but which nevertheless affect it. Examples of such areas are tax law, environmental law, laws in the field of advertising, social security law, procedural law and labour law.¹⁴⁷ It is thus to this field that collective action is to be attributed. Finally, *rights for providers and recipients* are the rights of the persons involved to enter, reside in and exit the territory of another Member State.¹⁴⁸ As for the two latter categories, the model claims that the Court has kept within the framework of the prohibition on discrimination. Hence, in respect of service associated legal areas and rights for providers and recipients, Article 56 TFEU is to be regarded as an expression of the non-discrimination principle and, accordingly, only encompass

¹⁴³ There are however those who still advocate for an interpretation based on a discrimination test, see e.g. Snell and Andenas, p. 84 ff.

¹⁴⁴ St Clair Renard, (2007) p. 78.

¹⁴⁵ *Ibid.*, p. 108 ff.

¹⁴⁶ *Ibid.*, p. 156 ff.

¹⁴⁷ *Ibid.*, p. 161 ff.

¹⁴⁸ *Ibid.*, p. 193 ff.

discriminatory measures.¹⁴⁹ An exception is however made for the field of advertising where all restrictions are, due to the significance of advertising for cross-border trade, be prohibited.¹⁵⁰ It follows that, should the Court embrace this model, non-discriminatory collective action would fall outside the scope of Article 56 TFEU.

In the following sections I will first analyse the case-law of the ECJ in the field of service associated legal areas and, second, present some arguments in favour of and against the differentiated interpretation model, in order to anticipate the likely outcome should the question be referred to the Court.

3.1.1 Legal analysis

In order to determine the support of the differentiated interpretation model in the ECJ's jurisprudence, I will in the following section analyse the case-law in the field of service associated legal areas. For obvious reasons, I will focus on the case-law relating to labour law and more briefly examine the other service associated legal areas.

3.1.1.1 Case-law in the field of labour law

Before analysing the case law relating to this area, a few remarks should be made on the Posted Workers Directive. The directive was introduced, as a result of several Member State's concern about the ECJ's increasing keenness to apply Article 56 TFEU in the field of labour law, in order to limit the application as regards posted workers.¹⁵¹ The directive seeks, by means of Article 3 thereof, to lay down mandatory minimum protection rules for workers which must be respected by foreign service providers that post workers to the host Member State and which, therefore, will not be considered as restricting the freedom to provide cross-border services. However, by virtue of its minimalist character, the directive does not exhaust the application of Article 56 TFEU. A measure that is incompatible with the posted workers directive will, a fortiori, be contrary to Article 56 TFEU, because that directive is intended, within its specific scope, to implement the terms of that article. On the other hand, to hold that a measure conforms with the directive does not necessarily mean that it meets the requirements of Article 56 TFEU.¹⁵² It follows that, although some of the cases referred to below partly concern the application and interpretation of the posted workers directive, they are still relevant for the purposes of interpreting Article 56.

¹⁴⁹ *Ibid.*, p. 187 ff. and 210 f. See also St Clair Renard, S., How Free Is the Free Movement of Services?, in Gustavsson, Oxelheim and Pehrson (Eds.), How Unified Is the European Union?, (2009), p. 66 and 75.

¹⁵⁰ St Clair Renard, (2007), p. 186 f.

¹⁵¹ St Clair Renard, (2007) p. 167.

¹⁵² Opinion of AG Mengozzi in Case C-341/05 *Laval* paras 146-150.

The first case in the field of labour law that calls for attention is *Rush Portuguesa*.¹⁵³ In this case, an undertaking established in Portugal brought its Portuguese employees from Portugal to France for the carrying out of construction works in the latter State, in contravention of the French Labour Code. The ECJ was called upon to give a preliminary ruling on the Labour Code's compatibility with Article 56 TFEU, which made the movement of staff subject to a condition as to engagement in situ or an obligation to obtain a work permit. The Court held that Article 56 and 57 TFEU precludes a Member State from imposing such conditions, since it *discriminates* against a person providing services established in another Member State in relation to his competitors established in the host country who are able to use their own staff without restrictions, and moreover affects his ability to provide the service.¹⁵⁴ In addition, the Court stated that, since the concept of the provision of services as defined by Article 57 of the Treaty covers very different activities, *the same conclusions are not necessarily appropriate in all cases*.¹⁵⁵ In view of the fact that the measures were found to constitute restrictions on the Treaty provision on services because of their discriminatory nature, this ruling fits well with the thesis that measures relating to service associated legal areas must be discriminatory in order to be caught by Article 56 TFEU.¹⁵⁶ Furthermore, it even seems as if the judgement confirms the possibility and need for a differentiated interpretation. However, two remarks should be made. First, this judgement was delivered prior to the Court's explicit inclusion of non-discriminatory measures within the scope of Article 56 in the *Säger* case. Hence, the Court's application of the discrimination test was arguably not attributable to the fact that the measure related to a service associated legal area, but was simply an expression of the state of Union law at that time. Secondly, the statement that the broad concept of services motivates different conclusions in different cases was not made in the context of defining the scope of Article 56, but referred to the assessment of a derogation laid down in the Act of Accession of the Kingdom of Spain and the Portuguese Republic. Consequently, too far-reaching conclusions should in my opinion not be deducted from this case.

In a number of other cases in the field of labour law, the reasoning of the ECJ is rather ambiguous. The Court starts in these cases by reaffirming the finding in *Säger* that the Treaty requires not only the elimination of all discrimination on grounds of nationality, but also the

¹⁵³ Case C-113/89 *Rush Portuguesa*.

¹⁵⁴ Case C-113/89 *Rush Portuguesa*, para. 12.

¹⁵⁵ *Ibid.*, para. 16.

¹⁵⁶ See also Joined Cases 62 and 63/81 *Seco*, para. 12.

abolition of any restriction, which is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State. However, it then continues by stating that the application of the host Member State's domestic legislation to service providers is liable to prohibit, impede or render less attractive the provision of services *to the extent that it involves expenses and additional administrative and economic burdens*.¹⁵⁷ Hence, while the Court by its first announcement declares that no discrimination is necessary, it seems as if it, by its following statement, requires a dual burden, that is, indirect discrimination. So how are these two contradictory statements to be interpreted? On the one hand one could argue that the Court indicates that a measure relating to service associated legal areas is only capable of rendering the freedom to provide services less attractive in so far as it indirectly discriminates against foreign providers. Consequently, this would amount to a reading in line with the differentiated interpretation. On the other hand it can be held that the application of a national legislation must involve administrative and economic burdens, regardless of whether they affect providers within and outside the Member State equally, in order for it to constitute a restriction. Without such restrictive elements, the regulation would simply not affect the attractiveness of providing services and thus not constitute an obstacle to the free movement of services. This would thus be a reading in contradiction to the differential application. In any event, these cases can, when read in the light of the particular circumstances, be considered as supporting the thesis of a differentiated interpretation, since all the measures at issue can be held to impose double burdens on foreign service providers, which already must comply with the labour laws and collective agreements of the home state.¹⁵⁸ However, in many of these cases the double burden reasoning is, in my view, rather contrived. That is particularly so as regards the cases which concern minimum wages. If the employer applies the higher minimum wages of the host state, he automatically fulfils the minimum wages of the home state. Provided that the related taxes and charges are comparable, it is thus inconceivable to talk about an adaptation to two sets of rules which put foreign service providers in a less favourable position. On the contrary, they will rather be put in an equal position as national service providers.

¹⁵⁷ Case C-165/98 *Mazzoleni* paras 23-24; Case C-164/99 *Portugaia* [2002] ECR I-787, paras 16-18 and Case C-60/03 *Wolff & Müller GmbH & Co. KG v. José Filipe Pereira Félix* [2004] ECR I-9553, paras 31-32. For similar reasoning see Case C-43/93 *Vander Elst* paras 14-15; Case C-272/94 *Guiot*, paras 10 and 14; Joined Cases C-369 and 376/96 *Arblade and Others*, paras 33, 50 and 58 and Case C-346/06 *Dirk Ruffert v. Land Niedersachsen* [2008] ECR I-1989, para. 37.

¹⁵⁸ St Clair Renard, (2007) p. 169.

Finally, we have the *Laval* case in which two questions regarding the right to take collective action was referred to the ECJ.¹⁵⁹ The first question concerned whether the right of Swedish trade unions to resort to collective action against an undertaking established in another Member State, in order to force it to enter into negotiations on the rates of pay for posted workers and to sign a collective agreement, was compatible with Article 56 TFEU and the posted workers directive. Given that certain terms of the collective agreement at issue went beyond the minimum protection guaranteed by the posted workers directive, the Court could merely conclude that the right to take collective action constituted a restriction, without having to address the matter of discrimination.¹⁶⁰ The second question concerned the Swedish “*Lex Britannia*” according to which the prohibition for employers and workers to take collective action when bound by a collective agreement was applicable solely to action taken by reason of terms and conditions of employment falling directly within the scope of the Swedish law on workers. Accordingly, the mandatory social truce was, in practice, reserved to agreements signed with Swedish trade unions. The Court held that *the freedom to provide services implies, in particular, the abolition of any discrimination* against a service provider on account of its nationality or the fact that it is established in a Member State other than the one in which the service is provided. Since the Swedish rules failed to take into account collective agreements to which undertakings that posted workers to Sweden were already bound in the Member State in which they were established, they were considered to give rise to discrimination against such undertakings. Given that they were treated in the same way as national undertakings which had not concluded a collective agreement, in effect, different situations were treated similarly.¹⁶¹ The case clarifies that the non-discrimination principle is not obsolete in the context of the free provision of services. Conversely, it confirms that the principle still is the core element of the restriction prohibition in Article 56 TFEU. Thereby, the case supports the differentiated interpretation. On the other hand, the Court has signalled that Article 56 TFEU first and foremost is a prohibition on discrimination in cases concerning the actual service activity as well.¹⁶² The fact that it also encompasses other restrictions does not absolve the non-discrimination principle of its significance for the realization of the common market. Therefore, the support of the differentiated interpretation which the reasoning in *Laval* entails must be considered as fairly weak.

¹⁵⁹ Case C-341/05 *Laval*.

¹⁶⁰ *Ibid.*, paras 99-100.

¹⁶¹ Case C-341/05 *Laval*, paras 114-116.

¹⁶² See e.g. Case C-17/92 *Federación de Distribuidores Cinematográficos v Estado Español et Unión de Productores de Cine y Televisión* [1993] ECR I-2239, para. 15

3.1.1.2 Case-law in the field of other service associated legal areas

Another area in which the ECJ frequently has applied Article 56 TFEU is *tax law*. Like the jurisprudence in the field of labour law, the rulings which concern taxes are not entirely consistent. In a few cases, the Court has explicitly held that the measure at issue constitutes discrimination.¹⁶³ By contrast, in other cases, the Court has seemed reluctant to use the term discrimination and has merely concluded that there is a restriction.¹⁶⁴ As a consequence, some scholars have interpreted the Court's findings as establishing a prohibition on any restrictions in the field of tax law,¹⁶⁵ while others are of the view that this field only requires equal treatment, or in other words, just encompasses discriminatory measures.¹⁶⁶ However, when studying the facts of the cases in which the Court has not explicitly referred to the measure as discriminatory, one can conclude that they clearly amount to situations of indirect discrimination. Consequently, these cases do not contravene the thesis of a differentiated interpretation.¹⁶⁷ Another case in the field of tax law which can be held to support the differentiated interpretation model is *Mobistar*.¹⁶⁸ The ECJ held in this case that measures which only *create additional costs* in respect of the service in question and which *affect in the same way* the provision of services between Member States and that within one Member State do not fall within the scope of Article 56 of the Treaty. It then continued to evaluate the tax measures at issue in the dispute and found that since foreign operators were not, either in fact or in law, more adversely affected by those measures than national operators and since the measures did not make cross-border service provision more difficult than national service provision, they were not incompatible with the freedom to provide services.¹⁶⁹ It seems here as if the Court applied a pure non-discrimination approach. If Article 56 TFEU amounts to a general prohibition on restrictions, the measure would arguably have fallen within the scope of application, since the creation of additional costs must be seen as liable to make the

¹⁶³ See e.g. Case C-390/96 *Lease Plan Luxembourg v. Belgium* [1998] ECR I-2553, para. 33 and Case C-42/02 *Lindman* [2003] ECR I-13519, paras 21-22.

¹⁶⁴ Case C-204/90 *Bachmann*; Case C-118/96 *Safir v. Skattemyndigheten i Dalarnas Län* [1998] ECR I-1897; Case C-55/98 *Skatteministeriet v. Vestergaard* [1999] ECR I-7641; Case C-294/97 *Eurowings Luftverkehrs AG v. Finanzamt Dortmund-Unna* [1999] ECR I-7447; Case C-422/01 *Skandia and Ramstedt v. Riksskatteverket* [2003] ECR I-6817; Case C-290/04 *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel* [2006] ECR I-9461 and Case C-433/04 *Commissions v. Belgium* [2006] ECR I-653.

¹⁶⁵ Bergström, Något om EG-domstolens tolkningsprinciper, med särskild inriktning på inkomstskatterätten, SN, no. 9, (1998), s. 581 ff.

¹⁶⁶ Ståhl, K. and Persson Österman, R., EG-skatterätt, (2000), p. 77 and St Clair Renard, (2007), p. 172 ff.

¹⁶⁷ St Clair Renard, (2007), p. 174 f. and Ståhl, K., EG-domstolens domar, SN, no. 6, (2007), p. 359 ff. Similar cases can also be found in the field of social policy and social security law, see Case C-484/93 *Svensson & Gustavsson v. Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955; Case C-158/96 *Kohll* and Case C-157/99 *Smits & Peerebooms*.

¹⁶⁸ Joined Cases C-544 and 545/03 *Mobistar SA v. Commune de Fleron* [2005] ECR I-7723.

¹⁶⁹ *Ibid.*, paras 31-35.

provision of services less attractive. However, it has also been suggested that the ECJ combined the discrimination test with a test of market access,¹⁷⁰ which also seemed to be how the Court applied Article 56 TFEU to the tax measure at issue in *Viacom II* delivered a few months earlier.¹⁷¹ Taking that view, the Case should rather be attributed to the model described below in Chapter 3.2.

Another interesting case for the purposes of this analysis is found in the field of *procedural law*.¹⁷² The German Code of Civil Procedure only allowed for undertakings to carry out judicial debt-collection work for others through the intermediary of a lawyer. Consequently, debt-collection undertakings were prohibited from carrying out judicial debt-collection work themselves. The Court held that such a prohibition constitutes a restriction on freedom to provide services within the meaning of Article 56 of the Treaty, albeit it applies without distinction to national providers of services and to those of other Member States, since it makes it impossible to provide those services in Germany.¹⁷³ This case directly contravenes the differential interpretation theses, since the court applied Article 56 TFEU to a service associated legal area even though no discrimination was at hand. In my opinion, it is however questionable whether this case should be attributed to the field of service associated legal areas. Since the reservation of judicial debt-collection work to lawyers corresponded to a prohibition for others to provide such services it directly regulates the provision of services. Consequently, it could be regarded as concerning the actual service activity, which entails that all restrictions are prohibited.¹⁷⁴

Finally, one case in the field of *environmental law* should be mentioned. The case concerned an Italian prohibition for vessels to discharge into the sea substances harmful to the marine environment in territorial waters and internal maritime waters.¹⁷⁵ The prohibition was applicable regardless of nationality and was challenged by an Italian captain. The Court first declared that the prohibition was not discriminatory. However, the Court did not stop there, but continued to examine whether the prohibition nevertheless constituted a restriction and found that that was not the case.¹⁷⁶ On the one hand it can be argued that if service associated legal areas only encompass discriminatory measures, the Court would not have engaged in a

¹⁷⁰ Barnard, p. 281.

¹⁷¹ Case C-134/03 *Viacom Outdoor Srl v. Giotto Immobilier SARL* [2005] ECR I-1167, paras 35-38.

¹⁷² Case C-3/95 *Reisebüro Broede*

¹⁷³ *Ibid.*, para. 27.

¹⁷⁴ See above section 3.1.

¹⁷⁵ Case C-379/92 *Peralta* [1994] ECR I-3453.

¹⁷⁶ *Ibid.*, paras 47-54.

general restriction examination. On the other hand it can be alleged that the case can be explained by the Court's inconsistent terminology. When the Court referred to discriminatory measures it actually meant *directly* discriminatory measures and the restriction examination was in fact a review of whether the prohibition was *indirectly* discriminatory. Given that the Court motivated its finding by the fact that the prohibition did not afford any particular advantage to the domestic Italian market, to Italian transport operations or to Italian products, I tend to incline to the latter view.¹⁷⁷

3.1.1.3 Interim conclusions concerning the differentiated interpretation

It is difficult to draw a general conclusion from these cases, partly because the ECJ differs in its terminology as regards the notion of discrimination and partly because the statements of the Court, when read in light of the facts of the cases, are open for interpretation. In most cases, however, some form of discrimination has been involved. Still, the Court has repeated the Säger formula, thus emphasising that no discrimination is required. One can ask oneself why the Court would do so if it intended service associated legal areas to be excluded from the application of the Säger doctrine. It is also important to note that the Court itself has never made the distinction between measures regulating the actual service activity and measures in the field of service associated legal areas. That is merely a construction made in the doctrine. Furthermore, I am not convinced that all service associated legal areas should be treated the same way. For instance, in the field of taxes and charges, the Court has seemingly kept within the framework of a discrimination prohibition. In my opinion this is not surprising, given that the imposition of a tax will always render the exercise of the freedom to provide services less attractive. Accordingly, if a pure Säger approach was applicable in this field, the obligation to pay taxes would automatically constitute a *prima facie* restriction of the freedom to provide services as long as an inter-state element is involved. Obviously, that can not be how Article 56 TFEU is intended to apply. The same does not necessarily hold true for the other areas. Rules in the field of procedural law, for instance, could as well facilitate the provision of services rather than obstruct it. In this field there is thus no reason to preclude the application of the Säger formula. This also seems to be the view taken by the Court in the above mentioned debt-collection case. But how about labour law? The incentives to preclude the application of the Säger formula are admittedly not as strong in this area as in the field of taxes, since there are labour law which work in favour of the employer. Nevertheless, since all rules aimed at protecting workers would most likely decrease the attractiveness of providing

¹⁷⁷ *Ibid.*, para. 51.

services, there are incentives to keep within a pure non-discrimination approach. As follows from the analysis above, it is however doubtful whether the jurisprudence of the ECJ supports such an interpretation. Furthermore, there are other criteria for limiting the scope of Article 56 TFEU, as will be shown below.

3.2 Market access

Another, and perhaps the most advocated, model for limiting the scope of Article 56 TFEU is to use *market access* as the delimiting criterion.¹⁷⁸ This does not, however, mean that the model deems the non-discrimination principle as obsolete. Conversely, discriminatory measures are treated as one out of two categories of obstacles to the free provision of services, while non-discriminatory measures which affect market access constitute the other.¹⁷⁹ This model is often held to apply uniformly to the different free movement rules, i.e. not only to services but to persons and goods as well. The tendency to include non-discriminatory measures within the free movement provisions started in the field of goods and has progressively spread to the other freedoms.¹⁸⁰ The starting point was the famous *Dassonville* case where the Court held that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Union trade are to be considered as restrictions to the free movement of goods.¹⁸¹ This case was followed by the equally famous *Cassis de Dijon* case in which the ECJ introduced the principle of mutual recognition, thus signalling its willingness to review all national legislative disparities.¹⁸² However, due to this broad definition of restrictions, almost any national market regulation could be caught by Article 34 TFEU even though it was not intended to interfere with free movement and the effect on inter-state trade was marginal. This led to an increasing number of far-fetched challenges of national regulatory policies, which burdened the resources and threatened the legitimacy of the Court. As a consequence of this development, the Court delivered its ruling in *Keck*, which concerned French rules prohibiting resale at a loss, in order to limit or clarify the scope of Article 34 TFEU.¹⁸³ The Court declared that national provisions restricting or prohibiting *certain selling arrangements* is not such as to hinder

¹⁷⁸ See e.g. Barnard, p. 262 ff; Weatherill, p. 896 ff; Edward and Shuibhne, p. 253 ff; Tesauro, The Union's Internal Market in the light of the Recent Case-law of the Court of Justice, YEL, 15, (1995); Craig and de Búrca, p. 831 ff and Maduro, M. P., Harmony and Dissonance in Free Movement, in Andenas, M. and Roth, W.-H., (Eds.), Services and Free Movement in EU Law, (2002).

¹⁷⁹ Edward and Shuibhne, p. 255 f.

¹⁸⁰ Barnard, p. 262 f. and Maduro, p. 41 ff.

¹⁸¹ Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837, para. 5.

¹⁸² Case 120/78 *Cassis de Dijon* para. 14.

¹⁸³ Joined Cases C-267-268/91 *Keck and Mithouard* [1993] ECR I-6097.

directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville judgment*, so long as those provisions apply to all relevant traders operating within the national territory and so long as they *affect in the same manner, in law and in fact*, the marketing of domestic products and of those from other Member States. The rationale behind this finding was that the application of such rules to the sale of products from another Member State is not by nature such as to *prevent their access to the market or to impede access any more than it impedes the access of domestic products*. Such rules, i.e. non-discriminatory measures regulating certain selling arrangements, were therefore considered to fall outside the scope of Article 34 of the Treaty.¹⁸⁴ Since the Court delivered this judgement it has frequently been suggested that this limitation should, and does, apply to services and persons as well, although with less focus on the form of measure (regulating selling arrangements) and more focus on the logics behind the ruling, that is, the effect on trade. Hence, a refined *Keck* principle could read “non-discriminatory measures which do not impose a hindrance to the access to the market of another Member State will not be caught by the Treaty provisions relating to goods, persons and services”.¹⁸⁵ Such a formula could however lead to practically the same scenario as the pre-*Keck* situation, as nearly any national regulation could be challenged as affecting market access at least to some extent. It therefore follows that this model calls for a way to limit the limitation by some sort of *de minimis* test.¹⁸⁶ The most commonly suggested criteria for this purpose is that the effect on market access must be *direct* and/or *substantial*.¹⁸⁷

3.2.1 Legal analysis

In the following section I will scrutinize if and how the ECJ has applied the criterion of market access and a *de minimis* test. The analysis will not only be confined to services, but encompass case-law in the field of goods and persons as well, since, as mentioned above, this model is held to be uniformly applicable.¹⁸⁸

¹⁸⁴ Joined Cases C-267-268/91 *Keck*, paras 16-17.

¹⁸⁵ Weatherill, p. 896 f.; Barnard p. 264 and Maduro p. 60 ff. There are however those who have emphasised the distinction between product rules and selling arrangements and argued that a limitation based on that distinction should also be made in the field of services, see e.g. Snell, p. 82 ff. That said, I will not present that model here for two reasons. First, the distinction has been regarded as an inadequate criterion for regulating the free movement of services, see e.g. Hatzopoulos, Recent developments of the case law of the ECJ in the field of services, CMLRev 37: 43-82, (2000), p. 68 and Tesouro, p. 7. Second, since collective action can neither be regarded as a product regulation nor as a measure regulating selling arrangements, the model is not of much use to answer the research questions of this essay.

¹⁸⁶ Edward and Schuibhne, p. 256.

¹⁸⁷ *Ibid.*; Weatherill p. 898 and Barnard p. 265.

¹⁸⁸ See *supra* note 178.

3.2.1.1 The criterion of market access

In *Leclerc Siplec*, a case in the field of goods concerning French rules prohibiting the distribution section from advertising on television, Advocate General Jacobs directly addressed the question of a refined *Keck* principle and a de minimis test.¹⁸⁹ Whilst acknowledging the correctness of the result in *Keck*, he contested the reasoning for attaining that result. First, he questioned the adequacy of making rigid distinctions between different categories of rules, and to apply different tests depending on the category to which particular rules belong. Second, he disputed the appropriateness of introducing, in relation to restrictions on selling arrangements, a test of discrimination. He stressed in that respect that if an obstacle to inter-State trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade. Finally, he suggested a single test formulated in the light of the purpose of Article 34, namely a de minimis test based on the extent to which a measure hinders trade between Member States by restricting market access. He concluded that Article 34 should be regarded as applying to all measures which are liable *substantially to restrict access to the market*.¹⁹⁰ When applying the test to the advertising prohibition at issue in the case he found that the effects of that prohibition did not amount to a substantial impact on trade between Member States sufficient to bring Article 34 into play.¹⁹¹ The Court, however, repeated its *Keck* formula and found that the prohibition met the requirements of being a non-discriminatory selling arrangement and was thus excluded from the scope of application of Article 34 TFEU.¹⁹² In my opinion, this does not mean that the ECJ rejected the Advocate General's suggestion. Given that the prohibition did neither discriminate, nor substantially affect market access, the two variants of the *Keck* principle led in this case to the same result. Consequently, since the variants were not pitted against each other, the Court could avoid taking a stance. The situation would have been different if a non-discriminatory selling arrangement actually would have constituted a substantial impediment on market access and, therefore, one cannot from this case maintain that the Court would have come to the same conclusion in such a case.

Alpine Investments, delivered a few months later, can be held to constitute an example of such a situation, that is, when the measure at issue regulates selling arrangements and is

¹⁸⁹ Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TFI Publicité SA and M6 Publicité SA* [1995] ECR I-179.

¹⁹⁰ The opinion of AG Jacobs in Case C-412/93 *Leclerc-Siplec*, paras 38-42.

¹⁹¹ *Ibid.*, paras 52-55.

¹⁹² Case C-412/93 *Leclerc-Siplec*, paras 21-24.

non-discriminatory, but nevertheless substantially affects market access.¹⁹³ In this case, the ECJ was explicitly called upon to rule on the application of *Keck* in the field of services. The defendant submitted that the prohibition on cold-calling fell outside the scope of Article 56 TFEU because it was analogous to the non-discriminatory measures governing selling arrangements which, according to the decision in *Keck*, do not fall within the scope of Article 34 of the Treaty. The Court disagreed, noting that the prohibition, which deprived the operators concerned of a rapid and direct technique for marketing and for contacting potential clients in other Member States, *directly affected access to the market in other Member States* and was therefore capable of hindering intra-Union trade.¹⁹⁴ Does this mean that the *Keck* doctrine does not apply to free movement of services? In my opinion the answer is negative. On the contrary, by focusing on the rationale behind *Keck*, i.e. the effect on inter-state trade, the Court rather confirmed the applicability of a refined *Keck*-principle. The reason why the Court did not apply the *Keck* derogation in this particular case was simply that the facts of the two cases were not comparable. Unlike the prohibition on resale at a loss in *Keck*, the prohibition on cold-calling in *Alpine Investments* did affect market access and the *Keck* derogation was therefore not applicable.

A similar result was subsequently reached in *Gourmet*, where the Court found that the prohibition on advertising at issue, even if it was non-discriminatory, had a particular effect on the cross-border supply of advertising space and thereby constituted a restriction on the freedom to provide services within the meaning of Article 56 of the Treaty.¹⁹⁵ This judgement can thus be held to confirm the ruling in *Alpine Investments* and the existence of a refined *Keck* principle in the field of services.

Another case in which the defendant failed to invoke the derogation laid down in *Keck* is *Bosman*.¹⁹⁶ The case concerned the transfer system in the football industry which required, when a player was transferred to another club, the payment of a compensation fee to the former club. These transfer rules applied to transfers of players between clubs within one Member State as well as from one Member State to another. Mr Bosman, a Belgian footballer wishing to move between clubs of different national associations, challenged the transfer rules under Article 45 TFEU as violating the free movement of workers. The Court

¹⁹³ Case C-384/93 *Alpine Investments*.

¹⁹⁴ Case C-384/93 *Alpine Investments*, paras 28-39.

¹⁹⁵ Case C-405/98 *Gourmet*, para. 39.

¹⁹⁶ Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL and others v. Jean-Marc Bosman* [1995] ECR I-4921.

found it sufficient to note that, although the rules in issue in the main proceedings applied equally to all transfers, they still directly affected players' access to the employment market in other Member States and were thus capable of impeding freedom of movement for workers. Therefore, they could not be deemed comparable to the rules on selling arrangements for goods which in *Keck* were held to fall outside the ambit of Article 34 of the Treaty.¹⁹⁷ Again, the Court focused on market access rather than on the formalistic wording of the *Keck* formula.

Finally, the recently delivered judgement *Mickelsson* should be mentioned, where a Swedish prohibition of using personal watercraft (jet-ski) on waters other than general navigable waterways was challenged as constituting an infringement on the free movement on goods.¹⁹⁸ Advocate General Kokott suggested that the prohibition, which could be characterized as an *arrangement of use*, should by analogy with the selling arrangements in *Keck* be excluded from the scope of Article 34 TFEU.¹⁹⁹ The Court did however not adhere to this suggestion, but determined the case by reference to the market access criterion.²⁰⁰ The ruling clarifies that there is nothing particular about selling arrangements which motivates a different application of Article 34 TFEU. Unlike product regulations, they can simply not be presumed to impose a double burden on foreign operators and therefore, unless they are obviously discriminatory, they have to be scrutinized under another criterion, i.e. market access. The same holds true for arrangements of use and any other rules that are not product regulations. Consequently, also in the field of goods, the Court has shifted focus (or rather clarified it) from the type of measure to the effect on trade.²⁰¹

3.2.1.2 The *de minimis* test

Alpine Investments, *Bosman* and *Mickelsson* can be held to confirm that the ECJ in fact has adopted a refined *Keck* principle with market access as the delimiting criterion. It is less apparent though whether the Court has made use of a *de minimis* test as suggested by Advocate General Jacobs in *Leclerc-Siplec*. It can be held that the Court, when stating that the measures at issue *directly* affected access to the market of another Member State, introduced a

¹⁹⁷ Case C-415/93 *Bosman*, para. 103.

¹⁹⁸ Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR 00000

¹⁹⁹ Opinion of AG Kokott in Case C-142/05 *Mickelsson*, paras 42-67.

²⁰⁰ Case C-142/05 *Mickelsson*, paras 26-28.

²⁰¹ For similar reasoning, see Derlén, M. and Linblom, J., *Mickelsson: två män på vattenskoter vänder upp-och-ner på fri rörlighet för varor*, SVJT, 10, (2009), p. 1079 ff. See also Case C-110/05 *Commission v. Italy* [2009] ECR 00000, para. 37.

de minimis criterion of directness. This is further supported by cases where the measures at issue were found to fall outside the scope of the free movement provisions as their alleged restrictive effects were considered as being *too uncertain and indirect* for them to be regarded as being capable of hindering trade between Member States.²⁰² However, none of these cases say much about the meaning of the criterion of directness and how to apply it. Does it mean that the impact of the national measure on market access has to be sufficiently great to trigger the application of the EC Treaty? Or does it refer to the cross-border nature of the restriction?²⁰³ In *Alpine Investments* it seems as if the Court on the one hand put emphasis on the impact when stressing that the operators were deprived of a direct marketing technique and, on the other hand, highlighted the cross-border nature of the measure when underlining that the prohibition on cold calling was not confined within one Member State but also applied to offers made to recipients in other Member States.²⁰⁴ The latter view finds support in the opinion of Advocate General Jacobs, where he held that while *Keck* concerned rules of the importing State relating to selling arrangements for the sale of goods *in the territory of that State*, *Alpine Investments* dealt with rules of the exporting State which required compliance not only for the provision of services in its own territory but also *in the territory of other Member States*.²⁰⁵ That view also fits well with the cases just mentioned where the measures were too uncertain and indirect to fall within the scope of the free movement provisions, since the license requirement in *LIDL Italia*, the entitlement to compensation on termination of employment in *Graf* and the requirement of patent holders to file a translation of their patents in the official language of the Member State concerned in *BASF*, where all regulations which applied solely within one Member state.²⁰⁶ However, this reasoning is in my view not satisfying, since a rule which actually does affect economic operators in other Member states should not be precluded from constituting a restriction simply because the rule is applied only within the territory of one Member State. In addition, such a view does not fit with the settled case-law derived from the *Säger* judgement. Perhaps the answer simply is that both the impact and the cross-border nature of the measure are relevant circumstances for the purposes of the de minimis test, given that they correspond to each other. If a measure is confined within one Member State it is less likely, but not excluded, that it will have a

²⁰² Case C-379/92 *Peralta*, para. 24; Case C-190/98 *Graf v. Filmoser Maschinenbau GmbH* [2000] ECR I-493, paras 23-25; Joined Cases C-140 to 42/94 *DIP SpA v Comune di Bassano del Grappa, LIDL Italia Srl v Comune di Chioggia and Lingral Srl v Comune di Chioggia* [1995] ECR I-3257, para. 29 and Case C-44/98 *BASF AG v. Präsident des Deutschen Patentamts* [1999] ECR I-6269, para. 16.

²⁰³ See Snell, p. 100.

²⁰⁴ Case C-384/93 *Alpine Investments*, paras 28 and 38.

²⁰⁵ See the Opinion of AG Jacobs in Case C-384/93 *Alpine Investments*, paras 60-61.

²⁰⁶ See *supra* note 202.

substantial impact on the market access of another member state. This also seems to be the view taken by Advocate General Jacobs in his opinion in *Leclerc-Siplec* where he wants to include circumstances such as whether the effect of the measure is direct or indirect, immediate or remote, or purely speculative and uncertain as parts of the assessment whether the effect on market access is substantial.²⁰⁷

3.2.1.3 Towards a general obstacle test?

Simultaneously as the period under which the cases just mentioned were delivered, a different line of case-law was developed where the Court merely concluded that an obstacle to free movement was at hand, without making use of a delimiting criterion such as market access. By simply declaring that the measure in issue rendered the free movement less attractive, seemingly any measure which to some degree decreased the economic profit or was otherwise inconvenient could fall within the scope of the free movement of persons and services. One such case is the above mentioned *Carpenter* case where the deportation of Mrs Carpenter, which hardly can be held to impede Mr Carpenter's access to the market of other Member States, was considered as detrimental to the conditions under which Mr Carpenter exercised the freedom to provide services. Another is *Pfeiffer Groshandel*,²⁰⁸ in which an Austrian prohibition on the subsidiary of a German undertaking from using a trade name already used in Germany by the parent company, which was substantially similar to the trade name of an Austrian competitor, was challenged under Article 49 TFEU. Although the prohibition was neither related to the taking-up of an economic activity, nor liable to discriminate, either directly or indirectly, against a person making use of the freedom of establishment, the Court classified it as a restriction. The rationale was that the prohibition could force the company group to adjust the presentation of the businesses they operated according to the place of establishment, thereby making the exercise of the freedom of establishment less attractive.²⁰⁹ Concerns of this development were expressed by Advocate General Tizzano, who in his opinion in *Caixa Bank* advocated for a return to the market access model.²¹⁰ Furthermore, he provided valuable guidance as to how to interpret the market access criterion. Firstly, the fact that other Member States apply less strict rules to providers of similar services established in their territory is not a sufficient reason for the purposes of that criterion.²¹¹ Secondly,

²⁰⁷ The opinion of AG Jacobs in Case C-412/93 *Leclerc-Siplec*, para. 45.

²⁰⁸ Case C-255/97 *Pfeiffer Groshandel GmbH v Löwa Warenhandel GmbH* [1999] ECR I-2835.

²⁰⁹ *Ibid.*, para. 20.

²¹⁰ The opinion of AG Tizzano in Case C-442/02 *CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-8961, paras 58-66.

²¹¹ *Ibid.*, para. 53.

measures that regulate the pursuit of an economic activity without discriminating in law and in fact between national and foreign operators cannot be regarded as directly affecting access to the market for the sole reason that they reduce the *economic attractiveness* of pursuing that activity.²¹² The Court seemed to adhere to Tizzano's opinion and determined the case by reference to the market access criterion.²¹³ Given that the ECJ has used the market access criterion in numerous cases since,²¹⁴ I am of the opinion that the general obstacle test has been abandoned and that market access at the present stage is the settled method for delimiting the scope of application as regards non-discriminatory measures. Arguably, the Court will continue to speak in terms of general obstacles, but only in so far as the existence of an obstacle is obvious, and use market access when the borderline is more difficult to draw.

3.3 Discussion and conclusions

Which one of these models that is preferable is noticeably a constitutional question, that is, whether you prefer a centralized or decentralized Union order. In this context, centralization means that the regulatory competence to a greater extent is allocated to the Union, while decentralization means a system where most aspects of economic regulation are left to the Member States. The wider the scope given to the free movement provisions, the more centralized the Union system becomes.²¹⁵ Hence, while the wider criterion of market access can be held to support the centralized approach, the narrower condition of discrimination rather works in favour of decentralization. I will not get any deeper into this polemic, but will confine myself to discuss which one of these models that is most suited for attaining a coherent case-law in line with the purposes of the Treaty provisions on free movement and the general principles of Union law. Then I will on the basis of the foregoing analysis determine which model that applies as case-law now stands.

Both these models have their benefits and downsides. The differentiated interpretation takes better into account the complex nature of the service concept. Given the various legal areas and regulations that today are capable of triggering the application of Article 56 TFEU, it is not self-evident that all of them should be treated the same way. This is all the more true since the Treaty makers did probably not foresee the ECJ's expanding interpretation, which has

²¹² The opinion of AG Tizzano in Case C-442/02 *CaixaBank*, para. 58.

²¹³ Case C-442/02 *Caixa Bank*, paras 12-14.

²¹⁴ See e.g. Case C-518/06 *Commission v. Italy* [2009], para. 64; Case C-500/06 *Corporación Dermoeestética SA v. To Me Group Advertising Media* [2008] ECR I-5785, para. 33, Case C-452/04 *Fidium Finanz*, para. 45 and Case C-433/04 *Commission v. Belgium*, paras 30-32

²¹⁵ Snell and Andenas, p. 82.

made politically sensitive areas where the Member States traditionally have safe-guarded their autonomy, such as labour and tax law, subject to review by the ECJ.²¹⁶ On the other hand, I find this model difficult to apply. Not only does it require a discrimination assessment, which, as is apparent from Chapter 3.1.1, can be quite a tricky task in itself, but also a classification of the measure as regulating the actual service activity or relating to service associated legal areas. As is apparent from the analysis above, it is far from always obvious to which category a measure should be attributed. Consequently, since, for one, the line of demarcation between indirectly and non-discriminatory measures is in practice far from being entirely clear and, for two, the classification of a measure as relating to the actual service activity or to service associated legal areas is by no means a simple one, to impose such delimitations of the scope of Article 56 TFEU would affect the legal certainty of operators.

Furthermore, the distinction between the actual service activity and service associated legal areas sometimes seems inadequate. One example to this is the above mentioned *Breode* case. One can ask oneself why a rule with the effect of prohibiting debt-collectors from carrying out judicial debt-collection work themselves should escape classification as a restriction just because it is found in the field of procedural law. Does it not in fact regulate the actual service activity? The same can be held in regard of labour law. Does, for instance, a requirement to pay certain minimum wages not regulate the conditions under which the service may be provided? It seems to me as if the differentiated interpretation seeks to restore the formalistic approach for which *Keck* has been so heavily criticized and which the Court since that judgement has been trying to depart from. In essence, it puts focus on the form of the measure and not on its effect. Arguably, this contravenes the very aim of the free movement provisions which allegedly is to prevent all unjustified obstacles, whatever their form, to inter-state trade. Similarly, the use of a discrimination test can be questioned in the light of that aim. As AG Jacobs held in *Leclerc Siplec*, if an obstacle to inter-State trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade.²¹⁷

It follows, that the differentiated interpretation can be criticized for jeopardizing the legal certainty of operators and for contravening the aim of the free movement provisions.

Even though the model based on market access and a de minimis test also has been held difficult to apply,²¹⁸ it is in my opinion much less confusing than the differentiated interpretation. Grey zones are inevitable, but they will arguably be fewer if national measures

²¹⁶ St Clair Renard, (2007), p. 321 f.

²¹⁷ The opinion of AG Jacobs in Case C-412/93 *Leclerc-Siplec*, para. 39.

²¹⁸ The opinion of AG Tesaro in Case C-292/92 *Ruth Hünernmund and Others v. Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787, para. 21.

are scrutinized under a single test of uniform application. The exclusion of non-discriminatory measures in the field of service associated legal areas from the scope of application would supposedly only lead to contrived double burden reasoning or the gradual imposition of derogations, like the one on advertising. As far as I am concerned, this would make the scope of application of Article 56 TFEU more unpredictable than the test based on market access. Consequently, the market access model does not only fit better with the aim of the Treaty as it focuses on the effect of the measure, but it is also a more appropriate means for ensuring the legal certainty of operators.

Surely, it can be argued that the market access model could lead to a pre-*Keck* scenario, where the most far-fetched challenges will be brought before the national courts, and even to a race to the bottom. However, with a de minimis test preventing measures with too slight an impact on inter-state trade from passing the threshold, such a development can allegedly be avoided. It should also be recalled that the fact that some Member States may apply stricter rules than others is not in itself sufficient for Article 56 TFEU to come into play. Therefore I believe that the fear of a race to the bottom is unfounded or at least exaggerated.

In view of the foregoing, I am of the opinion that the model based on market access should apply. That said, the question remains which one of these models that has been embraced by the ECJ. Of course, the two models do not exclude one another. It would be possible to apply a pure discrimination approach as regards service associated legal areas and use market access as the delimiting criterion when it comes to the actual service activity. However, I do not believe that that is the model employed by the Court thus far or is prepared to introduce in the future. When analysing the Court's case-law it can be concluded that it is in the field of tax law that the differentiated interpretation finds its strongest support. In this field it seems, at first sight, as if the Court has applied a pure discrimination approach. However, as Advocate General Tizzano pointed out in *Hünermund*, a tax measure which only affects the economic attractiveness of providing services is not such as to affect market access. Therefore, such a measure must be discriminatory in order to fall within the scope of Article 56 TFEU. Hence, what appears to be a sole application of a prohibition on discrimination can also be explained by reference to the criterion of market access. Furthermore, the market access model fits better into the Court's general terminology as regards the classification of a measure as discriminatory or not. According to the differentiated interpretation, the difference between indirectly and non-discriminatory measures is crucial. However, that is not how the ECJ seems to look at it. On the contrary, the Court usually merely distinguishes between directly discriminatory and indistinctly applicable measures, where the latter is a generic term for

indirectly as well as non-discriminatory measures. Hence, the Court treats indirectly and non-discriminatory measures the same and generally uses market access as the delimiting criterion in both cases²¹⁹ and – due to the reasons outlined above – rightly so.

3.4 Market access and collective action

If we assume that market access is the relevant delimiting criterion, it must be determined how this criterion relates to collective action. In other words, can collective action be considered liable to directly affect the access to the market of another Member State so as to fall within the scope of Article 56 TFEU? As is evident from *Laval*, the answer is affirmative. The same was proven valid with regard to Article 49 TFEU, i.e. establishments, in *Viking*. The Court seemingly used the broad ‘general obstacle test’ as it concluded that the collective action in the respective main proceedings was liable to make the exercise of the freedoms less attractive.²²⁰ These findings have caused scholars to believe that all collective action is liable to constitute an impediment on the freedom of movement.²²¹ However, the Court’s concern was presumably that the collective actions at issue affected *Viking*’s and *Laval*’s access to the markets of other Member States. In *Laval*, the access to the Swedish market had been made conditional on signing the collective agreement for the building sector and completing wage negotiations with the relevant trade union.²²² In *Viking*, the access to the Estonian market had in practice become subject to the relevant trade unions’ consent.²²³ Given the obvious existence of restrictions, the Court found supposedly no need to engage in a more careful market access analysis.²²⁴ Consequently, these cases do not mean that the Court returned to a general obstacle test with the consequence that all collective action with cross-border implications will be caught by the freedoms of movement. As the Court held in *Viking*, it cannot be considered inherent in the very exercise of trade union rights and the right to take collective action that those freedoms will be prejudiced to a certain degree.²²⁵ Hence, the Court made clear that there may be collective action which will fall outside the scope of the

²¹⁹ A reservation must here be made for rules where the indirectly discriminatory element is apparent, e.g. language requirements or rules which correspond to the goods context’s product regulations, where the double burden is obvious. In those cases the Court does not have to scrutinize the measure in the light of market access.

²²⁰ Case C-341/05 *Laval*, para. 99 and Case C-438/05 *Viking*, paras 72-73.

²²¹ See e.g. Syrpis, P. and Novitz, T., Economic and social rights in conflict: Political and judicial approaches to their reconciliation, *ELRev*, (2008), p. 419; Hös, N., The principle of Proportionality in the *Viking* and *Laval* Cases: An Appropriate Standard of Judicial Review?, *EUI Working Papers*, LAW 2009/06, p. 20 and Davies, A. C. L., One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ, *Industrial Law Journal*, Vol 37, No. 2, (2008) p. 140

²²² Davies, p. 14.

²²³ See the Opinion of AG Maduro in Case C-438/55 *Viking*, para. 55.

²²⁴ See chapter 3.2.1.3 above.

²²⁵ Case C-438/05 *Viking*, para. 52.

free movement provisions. This brings us to the question of how the criterion of market access will relate to collective action that is neither aimed at, nor have the effect of, adversely affecting cross-border situations as compared to internal ones. The answer will most likely not be the same in every case, but will depend on the character of collective action in issue. If we use the wage strike against a service providing company with business in other Member States as an example, such an action in practice prevents the provision of services in the home state as well as in potential host states for an indefinite time. An employer is, especially in the field of services, dependent on the staff's performances. Hence, if the employees suspend their work, no services can be provided, neither within, nor outside the Member State. Consequently, such an action has a substantial impact on the access to the markets of other Member States, since it directly impedes the ability to provide cross-border services. Therefore it can be regarded as directly affecting access to the markets of other Member States. When looking at the example of a strike against a subcontractor in the host state on whom an operator providing services in that state is dependent, the answer might be different. It can be held that the strike affects the market access in that it makes it more difficult, expensive and time-consuming to penetrate the market of the host state. However, it may be that the restrictive effects of such an action would be considered as too uncertain and indirect for it to fall within the scope of Article 56 TFEU. Unlike the former example, the provision of cross-border services will not be prevented, only obstructed. Hence, the effects are not as severe and will depend on, for instance, the possibility to find other subcontractors.²²⁶ Consequently, such an action is less likely to be considered as directly affecting access to the market of another Member State. In most cases it would arguably rather be seen a commercial risk which has to be accounted for in business than a restriction on free movement. In any event, the question whether non-discriminatory collective action is liable directly to affect market access cannot be answered generally, but has to be determined on a case-by-case basis. It is however submitted that, although impediments on inter-state trade may not be inherent in the very exercise of the right to take collective action, the market access test will bring a great number of actions within the scope of Article 56 TFEU. Perhaps that is one of the reasons why Advocate General Maduro in his opinion in *Viking* suggested a somewhat different test, namely one that can be described as a *qualified market access test applicable to private measures*. He stressed that when a measure that originates from private actors is liable to cause disruptions to trade, the market will often "take care of it".²²⁷ Therefore, such

²²⁶ For similar reasoning see the Opinion of AG Jaenbs in Case C-412/93 *Leclerc-Siplec*, para. 45.

²²⁷ The Opinion of AG Maduro in Case C-438/05 *Viking*, para. 42.

measures should only be considered as restrictions within the meaning of the free movement provisions when they are capable of restricting others from exercising their right to freedom of movement, by *raising an obstacle that they cannot reasonably circumvent*²²⁸.

Consequently, the Advocate General linked the question of whether there is a restriction at hand to the question of horizontal direct effect. Even though he had a point in considering these two questions together – it is not self-evident that private measures should be treated the same as statal ones – I find it difficult to see the material difference between this test the ordinary *de minimis test*. In both cases, the result would probably be that the wage strike against a service provider with business in several Member States would be caught by Article 56 TFEU, while the strike against a subcontractor would not, since the latter but not the former would raise an obstacle that cannot reasonably be circumvented. Be that as it may, the Court did not adhere to the Advocate General's suggestion, but dealt with these issues separately. Therefore, it can be assumed that the Court is not prepared to mitigate the application of the market access test to collective action.

²²⁸ The Opinion of AG Maduro in Case C-438/05 *Viking*, para. 48.

4. Horizontal direct effect – applying Article 56 TFEU to trade unions

Another circumstance which has to be taken into account when answering the question whether non-discriminatory collective action is caught by Article 56 TFEU is that that provision is addressed to the Member States, while collective action is taken by trade unions, i.e. private parties. Does this fact exclude collective action from the application of Article 56 TFEU? In *Laval* the ECJ answered that question in the negative.²²⁹ The same conclusion was reached in *Viking* in regard of Article 49 TFEU, governing the freedom of establishment.²³⁰ Hence, the Court applied Article 56 and 49 TFEU horizontally and imposed on trade unions the obligation to respect free movement. This raises questions such as whether the same conclusion is valid for all collective action or if it was merely a result of the particular facts in those cases. Does the non-discriminatory character of the action in issue make any difference? In order to answer these questions an analysis is required of cases where the ECJ has applied the provisions of free movement to measures of private parties. Normally, such measures are excluded from the application of the Treaty provisions on free movement and are instead governed by the competition rules in Article 101 and 102 TFEU. However, three main situations when the Court has deviated from this principle can be outlined in case-law.²³¹ Firstly, the conduct of private parties has been caught by the free movement provisions when the state has failed to adopt adequate measures to prevent obstacles to free movement resulting from that conduct.²³² In such cases it is not really a matter of horizontal direct effect, but a vertical application to the state's non-action. This has also been described as *indirect horizontal effect*.²³³ Secondly, private parties have become subject to the free movement provisions when the rule or measure in issue were aimed at collectively regulating gainful employment or services.²³⁴ This is sometimes referred to as *semi-horizontal direct effect*.²³⁵

²²⁹ Case C-341/05 *Laval*, para. 98.

²³⁰ Case C-438/05 *Viking*, para. 66.

²³¹ A fourth situation could be added to this list, namely when a private body is acting on behalf of the state. In such situations, the Court has ascribed the measures of the private body to the Member State, see Joined Cases 266 & 267/87 *The Queen v Royal Pharmaceutical Society of Great Britain* [1989] ECR I-1295 and Case C-325/00 *Commission v. Germany* [2002] ECR I-9977. However, since these cases should rather be seen as an extension of the notion of a Member State than an extension of the effect of the free movement provisions, they will not be dealt with in this chapter.

²³² See Case C-265/95 *Commission v. France* [1997] ECR I-6959 and Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria* [2003] ECR I-5659.

²³³ The opinion of AG Maduro in Case C-438/05 *Viking*, para. 39.

²³⁴ See e.g. Case 36/74 *Walrave and Koch* [1974] ECR 1405, para. 17; Case 13/76 *Donà v. Mantero* [1976] ECR 1333, para. 17; Case C-415/93 *Bosman*, para. 82; Case C-176/96 *Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL* [2000] ECR I-2681, para. 35 and Case

Finally, *genuinely horizontal* situations have been caught by the provisions on free movement.²³⁶ I will briefly analyze these forms of horizontal applications in turn. Not only cases in the field of services will be dealt with, but also cases in the other free movement areas insofar as they are relevant for understanding the Court's reasoning in *Viking* and *Laval*. Subsequently, I will more carefully analyze the application of Article 49 and 56 TFEU to trade unions in *Viking* and *Laval* in order to answer the questions asked above. Finally, I will make some remarks on the implications of the case-law on goods.

4.1 Indirect horizontal effect

The concept of indirect horizontal effect was introduced in a goods context in the so called *angry farmers-case*.²³⁷ In this case, the French authorities were held responsible for violent acts committed by private individuals and by protest movements of French farmers directed against agricultural products from other Member States. The Court's motivation was straightforward and pragmatic – the fact that a Member State abstains from taking action to prevent obstacles to the free movement is just as likely to obstruct intra-Union trade as is a positive act. Therefore, and on basis of the loyalty obligation laid down in Article 4(3) of the Treaty on European Union (TEU),²³⁸ the Court concluded that the Member States are required to take all necessary and appropriate measures to ensure that the fundamental freedoms are respected on their territory.²³⁹ The same solution was subsequently applied in *Schmidberger*, in which obstacles to the free movement of goods created by an environmental demonstration on a major transit route entailed state liability.²⁴⁰ Notably, there is a crucial difference between this indirect form of horizontal application and a semi- or genuinely horizontal one, in that the former targets the (non-)action of a *state* while the two latter are directly applied to the actions of *private parties*. In fact, the Court has consistently refused to directly apply the Treaty provisions on goods to private parties, the rationale being that the conduct of private parties is dealt with under the competition rules.²⁴¹ However, as far as I am aware, there has

C-309/99 *Wouters and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, para. 120.

²³⁵ See e.g. Öberg, J., *Horizontal Direct Effect of Article 45 of the EC Treaty*, ERT, no. 4, (2007), p. 785 ff.

²³⁶ Case C-281/98 *Angonese v. Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139.

²³⁷ Case C-265/95 *Commission v. France*.

²³⁸ Ex. Article 10 of the EC Treaty.

²³⁹ *Ibid.*, paras 31-32.

²⁴⁰ Case C-112/00 *Schmidberger*. The restriction was however considered as justified.

²⁴¹ Joined Cases 177 & 178/82 *Van der Haar* [1984] ECR 1787, paras 11-12; Case 311/85 *Vlaamse Reisebureaus v. ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801, para. 30; Case 65/86 *Bayer v. Sülhofer* [1988] ECR 5249, para. 11; Case C-159/00 *Sapod Audic v. Eco-Emballages SA* [2002] ECR I-5031, para. 74. However, in the field of intellectual property rights there are cases which indicate that Article 34 TFEU can be applied to private parties, see e.g. Case 58/80 *Dansk Supermarked*

never occurred a situation in the goods context which could have entailed a semi-horizontal application because of the rules' collectively regulatory character. Therefore, one cannot definitely exclude the possibility of a semi-horizontal application of Article 34 TFEU.

So far, the *Angry Farmers* or *Schmidberger* solution has never been applied to services. Still, there is nothing to preclude such an application. The argument that a state's non-action is just as likely to obstruct intra-Union trade as is a positive act is equally valid with regard to services. So is the argument based on Article 4(3) TEU.²⁴² This solution also seems to have inspired the drafters of the Service directive, which compels on the *Member States to insure* that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.²⁴³ However, what kinds of actions by private parties that a Member State is required to prevent is not entirely clear. Is it only discriminatory measures as the service directive seems to suggest? Or is it the same acts as the Member State itself is prohibited from committing, that is, all measures which directly affects market access to another Member State? When considering the outcome in *Schmidberger* it certainly seems so, since the actions of the private parties in that case can be characterized as a non-discriminatory impediment to inter-state trade which nevertheless affected transportation companies' access to the markets of other Member States.²⁴⁴ In effect, this judgment creates an indirect obligation on private parties to comply with Union law which goes further than the direct obligation resulting from the genuinely and semi-horizontal effect.

4.2 Semi-horizontal direct effect

In a number of cases, starting with *Walrave*, the ECJ has applied the provisions on free movement of persons and services to rules originating from private organs *aimed at regulating gainful employment or the provision of services in a collective manner*.²⁴⁵ This somewhat vague concept has never been promptly clarified by the Court. However, when studying these cases one can identify some common features as regards the nature of the rules in issue. Characteristic is that they are all private legislation-like regulations which put the individual in a position vis-à-vis the private body not unlike that vis-à-vis the state. For

A/S v. A/S Imerco [1981] ECR 181 and *Case 187/80 Merck & Co Inc. v. Stephar BV and Petrus Stephanus Exler* [1981] ECR 2063. That said, there are also subsequent cases which imply the opposite, see e.g. *Case 19/84 Pharmon BV v. Hoechst AG* [1985] ECR 2281 and *Case 402/85 Basset v. SACEM* [1987] ECR 1747. See further Snell, p. 131 ff.

²⁴² For similar reasoning see Snell, p. 154.

²⁴³ Article 20 Directive 2006/123/EC of 12 December 2006 on services in the internal market.

²⁴⁴ *Case C-112/00 Schmidberger*, paras 60-64. See also the Opinion of AG Jacobs, paras 65-67.

²⁴⁵ *Case 36/74 Walrave*, para. 17; *Case 13/76 Donà*, para 17; *Case C-415/93 Bosman*, para. 82; *Case C-176/96 Lehtonen*, para. 35 and *Case C-309/99 Wouters*, para. 120; *Joined Cases C-51/96 and C-191/97 Deliège*, para. 47 and *Case C-519/04 P Meca-Medina and Majcen v. Commission* [2006] ECR I-6991, para. 24.

instance, rules laid down by sporting organizations²⁴⁶ and Bars²⁴⁷ determining the conditions under which sportsmen and advocates may pursue their respective activities have been caught by this concept. Seemingly, the private body must have a certain importance in the sector concerned for it to be considered as possessing sufficient power to impede the free movement.²⁴⁸ One main argument for including such rules within the Treaty provisions on free movement of persons and workers was that the abolition of State barriers could otherwise be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law. A second essential argument was that Member States which choose to regulate working conditions by law should not be put in a less favourable position than Member States in which those conditions are governed by agreements and other acts concluded or adopted by private persons.²⁴⁹ Consequently, it was not a matter of genuinely horizontal application, but an extended vertical or semi-horizontal one, introduced in order to *ensure the full effectiveness* (effet utile) and to *maintain the uniform application of Union law*.²⁵⁰

In early case-law, semi-horizontal application was confined to situations of discrimination.²⁵¹ However, this case-law predates the *Säger* judgment by several years and has been modified in subsequent cases. Hence, in *Bosman* and *Lehtonen* the Court applied Article 45 TFEU to rules laid down by sport organizations governing transfers of players, which applied equally or even stricter to domestic situations.²⁵² The same was held to apply in regard of services. Consequently, it can be concluded from these cases that semi-horizontal application of the Treaty provisions of persons as well as services does not require discrimination.²⁵³ In my view, this is the only tenable conclusion, since the opposite application would be to put Member States which choose to regulate working conditions by law in stead of by agreements in a less favourable position, contrary to the logics behind *Walrave*.

²⁴⁶ Case 36/74 *Walrave*; Case 13/76 *Donà*; Case C-415/93 *Bosman* and Case C-176/96 *Lehtonen*.

²⁴⁷ Case C-309/99 *Wouters*.

²⁴⁸ Cruz, J. B., Free movement and private autonomy, ELRev, Vol. 24, No. 6, (1999), p. 618 and Szyszczak and Cygan, p.159.

²⁴⁹ Case 36/74 *Walrave*, paras 18-19 and Case C-415/93 *Bosman*, paras 83-84.

²⁵⁰ Snell, p. 151; Kruse, p. 198 and Reich, p. 862.

²⁵¹ Case 36/74 *Walrave*, para. 21; Case 13/76 *Donà*, para. 17 and Case 90/76 *Van Ameyde v. UCI* [1977] ECR 1091, para. 28.

²⁵² Case C-415/93 *Bosman* and Case C-176/96 *Lehtonen*.

²⁵³ Oliver, P., and Roth, W.-H., The internal market and the four freedoms, CMLRev, 41: 407-441, (2004), p. 423.

4.3 Genuinely horizontal direct effect

The Court took the concept of horizontal direct effect even further in *Angonese*²⁵⁴ and applied Article 45 TFEU to what has been held to constitute a genuinely horizontal situation.²⁵⁵ The case concerned the requirement of a private bank for job applicants to produce a certificate of bilingualism issued by the local authority after an examination that had to take place in the province of Bolzano (Italy). Consequently, the certificate was more difficult for persons residing outside that province to attain. On the basis of this requirement the bank denied Mr Angonese, who lacked the relevant certificate but was impeccably bilingual, to take part in the competition for employment in the bank. As a consequence, Mr Angonese challenged the bank's requirement as infringing the free movement of workers. The Court started by citing *Walrave* and the "collective regulation formula" as well as the underlying reasons of *effet utile* and uniform application of Union law.²⁵⁶ When reading these paragraphs alone one could get the impression that the Court was still confined within the area of semi-horizontal application. However, the Court proceeded by referring to the *Defrenne* case in which the concept of horizontal direct effect of Treaty provisions initially was introduced.²⁵⁷ In that case, the Court declared that since Article 157 TFEU is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, *as well as to contracts between individuals*.²⁵⁸ In *Angonese*, the Court held that such considerations must also be applicable to Article 45 TFEU, which lays down a fundamental freedom and which constitutes a specific application of the general prohibition of discrimination contained in Article 18 TFEU. Consequently, the Court concluded that the prohibition of discrimination on grounds of nationality laid down in Article 45 TFEU must be regarded as applying to private persons as well.²⁵⁹

I would like to make two remarks in this context. Firstly, despite the fact that the Court refers to *Walrave*, the case should not be attributed to that line of case-law. In my opinion, it can scarcely be argued that a private bank has such collective regulating power over a sector or profession so as to fulfill the requirement of 'regulating working conditions in a collective manner'.²⁶⁰ Rather the case should be seen as dealing with a contract between individuals of a

²⁵⁴ Case C-281/98 *Angonese*.

²⁵⁵ See e.g. Barnard, p. 284 f. and Szyszczak and Cygan, p.159.

²⁵⁶ Case C-281/98 *Angonese*, paras 31-33.

²⁵⁷ Case 43/75 *Defrenne v. Société Anonyme Belge de Navigation Aérienne* [1976] ECR 455.

²⁵⁸ *Ibid.*, para. 39.

²⁵⁹ Case C-281/98 *Angonese*, paras 34-36.

²⁶⁰ In support of this view, see Öberg, p. 801 f.

non-collective character, as was the case in *Defrenne*. Given the emphasis the Court put on the *Defrenne judgement*, this is also how the Court seemed to look at it. Accordingly, the ECJ went beyond a semi-horizontal application and gave Article 45 TFEU a genuinely horizontal direct effect. Secondly, the case can only be considered to confirm such effect in regard of *discriminatory measures*.²⁶¹ This follows from the wording of paragraphs 34-36 of the judgment, in which the Court explicitly derives the horizontal effect of Article 45 TFEU from the general prohibition on discrimination laid down in Article 18 TFEU.

Whether a genuinely horizontal application is possible also in the field of services is uncertain, but there is much to indicate that so is the case. For starters, the ECJ seems generally not to make any difference between Article 45 and 56 TFEU with regard to their effect, as analogies are frequently made between them.²⁶² Furthermore, the argument of effet utile and uniform application of Union law should have the same value and importance with respect to the free movement of services as to the free movement of workers.²⁶³ Finally, just like Article 45 TFEU, Article 56 lays down a fundamental freedom and a specific application of the general prohibition on discrimination.

4.4 Legal analysis of the application of Article 49 and 56 TFEU to trade unions in *Viking* and *Laval*

In the following section I will analyse the legal base for the outcome in *Viking* and *Laval* and its anchoring in previous case-law. The purpose is to determine the chosen form of horizontal application in order to make conclusions on the practical and legal scope of the judgements. I will mainly, but not exclusively, refer to the Court's reasoning in *Viking*, where the question of horizontal direct effect was explicitly referred to the Court. So was not the case in *Laval* and, as a consequence, the judgment is somewhat fuzzier on that point. The outcome and underlying reasoning were in any event the same, whereby it can be assumed that the conclusions in *Viking* bear relevance for the application of Article 56 TFEU.

4.4.1 The form of horizontal application employed by the ECJ

So to which one of the above mentioned forms of horizontal effect is the application of the Treaty provisions on free movement to trade unions in *Viking* and *Laval* attributable? As regards the first form, i.e. indirect horizontal effect, it should be noted that the Court found in *Laval* that it was *the right* of trade unions to take collective action – not the action as such –

²⁶¹ See e.g. Barnard, p. 284 f. and Oliver and Roth, p. 426.

²⁶² See *supra* note 245.

²⁶³ See Öberg, p. 810.

that constituted a restriction on the freedom to provide services.²⁶⁴ This indicates that the claims should have been directed against the Member State for granting that right and not against the trade union. However, this finding is more than a little confusing since the Court subsequently scrutinized the trade union's *exercise* of that right – not the right as such – when it came to the question of justification.²⁶⁵ A similar curiosity is found in *Viking*, where the Court cited *Angry Farmers* and *Schmidberger*, in which the free movement provisions were invoked against Member states, in support of the conclusion that Article 49 TFEU may be relied upon against trade unions.²⁶⁶ This reference also signals that the defendant should actually have been the Member State and not the trade unions. Still, the indirect form of horizontal application can undoubtedly be ruled out. Despite the statements just mentioned, the Court did indeed apply Article 49 and 56 TFEU to the trade unions' actions and not to the Member State's failure to prevent the obstacles to free movement created by those actions. Therefore, the horizontal application was direct – not indirect. The Court's reference to *Angry Farmers* and *Schmidberger* was arguably an attempt to bring the four freedoms together by signalling that the indirect horizontal effect applied in relation to goods does not differ in substance, merely in form, to the semi-horizontal application used in relation to persons. At least, this was the view of Advocate General Maduro, who held that the substance of the problem – how to reconcile Viking Line's rights to freedom of movement with the rights to associate and to strike of the FSU and the ITF – would remain the same regardless of against whom the claims were directed.²⁶⁷ I am sure however that the Swedish building trade union (Byggnads), who was recently found liable for damages in the proceedings before the national court, would not agree as to the immaterialness of this difference.²⁶⁸ Furthermore, the private or state origin of the rule was in fact proven crucial for the assessment of justification in *Viking* and *Laval*.²⁶⁹

As for the two other forms of horizontal direct effects, the cases are more difficult to place. The distinction is nonetheless important since *only the genuine form of horizontal application requires discrimination*. In *Viking* the Court started by repeating the general reasons for including restrictions imposed by private bodies within the free movement provision, namely that the abolition of barriers to trade otherwise could be neutralized.²⁷⁰

²⁶⁴ Case C-341/05 *Laval*, para. 99.

²⁶⁵ See further Chapter 5.3.2 below.

²⁶⁶ Case C-438/05 *Viking*, para. 62.

²⁶⁷ The Opinion of AG Maduro in Case C-438/05 *Viking*, para. 40.

²⁶⁸ Judgement of Arbetsdomstolen, AD 2009 no. 89.

²⁶⁹ See chapters 5.3.2 and 5.3.3 below.

²⁷⁰ Case C-438/05 *Viking*, para. 57.

Since this argument is valid for both genuinely and semi-horizontal application and was used in the *Walrave* line of case-law as well as in *Angonese*, it does not say much about the intended form of horizontal application. The Court then continued by declaring that the prohibition on prejudicing a fundamental freedom laid down in a provision of the Treaty that is mandatory in nature applies in particular to all agreements intended to regulate paid labour collectively, referring to paragraph 39 in *Defrenne*.²⁷¹ This reference to a case which concerned a private contractual relationship can be interpreted as though a genuinely horizontal effect was intended. However, too far-reaching conclusions should not be drawn from this reference. The citation of *Defrenne* is not surprising, since paragraph 39 in that judgement, unlike the more general collective regulation formula in *Walrave*, specifically relates to collective agreements. It should also be noted that the Court left out the second part of paragraph 39 regarding ‘contracts between individuals’ and that it did not refer to *Angonese*. Consequently, there is nothing in this reference to imply a genuinely horizontal application. The Court thereafter went on to apply Article 49 TFEU to the facts of the case and found that the collective action taken by FSU and ITF was aimed at the conclusion of an agreement which was meant to regulate the work of Viking’s employees collectively, and, that those two trade unions were organisations which were not public law entities but exercised the legal autonomy conferred on them, inter alia, by national law.²⁷² A similar wording was used in *Laval*.²⁷³ Therefore Article 49 and 56 TFEU was to be interpreted as meaning that, in circumstances such as those in the respective main proceedings, could be relied on by a private undertaking against a trade union or an association of trade unions.²⁷⁴ Hence, the Court explicitly applied the collective regulation requirement laid down in *Walrave*, which suggests that it was a matter of semi-horizontal application. Nevertheless, it has been argued that since the ECJ clearly stated that it does not regard unions as public bodies it made clear that the effect was genuinely horizontal.²⁷⁵ I do not agree with this argument. Conversely, the Court emphasized in *Viking* that the semi-horizontal effect is not dependent on the quasi-public character of the body in issue.²⁷⁶ Consequently, that argument is based on a misinterpretation of the collective regulation requirement. I will return to this below.

²⁷¹ *Ibid.*, para. 58.

²⁷² *Ibid.*, para. 60.

²⁷³ Case C-341/05 *Laval*, para. 98.

²⁷⁴ Case C-438/05 *Viking*, para. 61.

²⁷⁵ Davies, p. 136.

²⁷⁶ Case C-438/05 *Viking*, para. 64.

4.4.2 *The interpretation of the collective regulation formula*

As follows from the foregoing, I am of the view that the Court applied a semi-horizontal effect in *Viking* and *Laval*. Also the arguments of the parties, the Commission and the intervening Member States were confined within the framework of semi-horizontal application. The main issue was how to interpret the collective regulation requirement and whether this was fulfilled by the trade unions and collective agreements in issue. There was an evident dividing line between the opinions of the new and the old Member States. The view that Article 49 and 56 TFEU are directly applicable also to trade unions was upheld straightforwardly by new Member States such as the Czech Republic, Estonia, Latvia and Poland, while old Member States such as Austria, Belgium, Finland, France, Italy, Germany and Sweden took the opposing view.²⁷⁷ The main argument of *Viking* and the new Member States was that in Scandinavia, it is collective agreements rather than legislation that regulate pay and working conditions. Even though trade unions may not by themselves lay down rules in a collective manner, as is the case with the professional associations in *Walrave* and *Bosman*, their action de facto have this effect. Therefore, the collective bargaining agreements entered into by the FSU do regulate employment in a collective manner. The same holds true for the ITF circular which the members, in accordance with the principle of solidarity and on pain of penalties, are bound to give effect to. By contrast, The ITF, the FSU and the old Member States, supported by the Commission, held that industrial action does not involve measures designed to collectively regulate establishment and services. Trade unions merely have the right to negotiate, not to specify terms with which an employer must comply. Therefore, they cannot be compared to the quasi-public bodies in *Walrave* and *Bosman*, particularly not the ITF whose circular's effectiveness is entirely dependent on the solidarity between its members. The FSU also argued in more general terms that to apply horizontal direct effect to collective agreements would open the floodgates. Since there are major differences among the Member States' social models and collective bargaining systems, every collective agreement could not be characterised as having the regulatory effect required to fall within the scope of the free movement provisions. This would not only lead to severe application problems as to which criteria that should be determinative in distinguishing regulatory agreements, but also to endless references from national courts to the ECJ asking whether specific collective agreements possesses regulatory effect.

²⁷⁷ For a summary of the parties' and the Member States' arguments, see Bercusson, B., *The Trade Union Movement and the European Union: Judgement Day*, ELJ, Vol. 13, No. 3, (2007), p. 286 ff.

The Court rejected the arguments of the unions and the old Member States and found, as mentioned above, that the collective action taken by FSU and ITF was aimed at the conclusion of an agreement which was meant to regulate the work of Viking's employees collectively. It further added that there is no indication in the *Walrave* line of case-law that could validly support the view that it applies only to associations or to organisations exercising a regulatory task or having quasi-legislative powers. Moreover, the Court pointed out that, in exercising their autonomous power, pursuant to their trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers, *trade unions participate in the drawing up of agreements seeking to regulate paid work collectively*.²⁷⁸

The Court's statements demonstrate that the old Member States wrongly focused on whether trade unions are regulatory or quasi-public bodies. That is not the essence in the *Walrave* doctrine, even though the bodies in that case-law could be characterized as such. By emphasizing that it is sufficient for the application of the *Walrave* doctrine that trade unions *participate* in the drawing up of agreements seeking to regulate paid work collectively, the Court made clear that it does not require that the private body has the power to independently adopt rules relating to working conditions or the provision of services.

Despite the criticism of several scholars,²⁷⁹ the outcomes were in my view consistent with the general approach employed by the ECJ with regard to horizontal direct effect and in that sense no surprise. The judgements had a firm legal base in preceding case-law and in the principles of *effet utile* and the uniform application of Union law. Those principles were arguably the very reasons for introducing the concept of direct effect in the first place.²⁸⁰ Naturally, the Court could not jeopardize the practical effect of those principles by letting private parties exercise the autonomous power conferred on them by Member States beyond reach of Union law. Whether that autonomous power consists in the ability to independently adopt rules aimed at collectively regulating employment or the permission to take collective action in order to enforce such rules does just not seem relevant. They both constitute an equal threat to the effectiveness and the uniform application of Union law. It is true that the formulation 'rules' and 'regulating' have a quasi-statal ring, but as Snell rightly points out, the

²⁷⁸ Case C-438/05 *Viking*, paras 64-65.

²⁷⁹ See e.g. Syrpis and Novitz, p. 421; Davies, p. 136 f and Azoulai, L., The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization, CMLRev 45: 1335-1356, (2008), p. 1343 ff.

²⁸⁰ Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] ECR I. See also Öberg, p. 781.

whole system of free movement law is based on the effect on a measure, not on its form.²⁸¹

Hence, the fact that the measures in *Viking* and *Laval* took the form of actions instead of rules did and should not remove them from the ambit of free movement, as their effects on inter-state trade were just as severe.

Another objection made by some scholars is that in the preceding case-law, the horizontal direct effect operated to defend the rights of workers, whereas in *Viking* and *Laval*, it was used against them.²⁸² However, this argument does not bear scrutiny in the light of the aim and purpose of the free movement provisions. These provisions are only concerned with the rights of workers in so far as they are deprived of their right to free movement. Hence, it is the freedom of movement, not the rights of workers, that the Treaty freedoms are aimed to protect. Obviously, this aim remains the same irrespective of the state or private origin of a restriction.²⁸³

4.5 General consequences of *Viking* and *Laval* for the applicability of Article 56 TFEU to trade unions

As follows from the foregoing, trade unions may, by virtue of their autonomous power to participate in the drawing up of collective agreements, become subject to the Treaty provisions on free movement. Whether this applies in every situation, or rather, to every collective agreement is, however, uncertain. As the FSU pointed out, the Member States' collective bargaining systems differ and it might not be that every collective agreement could be considered as possessing regulatory effect. For instance, in the UK, collective agreements are not legally enforceable and are relatively sparse in their coverage of the workforce.²⁸⁴ It has been held that it would therefore seem absurd to treat them the same as *erga omnes* collective agreements.²⁸⁵ I, on the other hand, am doubtful as to the validity of this reasoning. The *Walrave* formula only requires that the rules are *aimed* at collective regulation. In *Viking*, an even looser formulation was used, namely that the agreement *seek* to regulate paid work collectively. Is it not so that collective agreements always are aiming at, or seeking to, regulate working conditions collectively, regardless of whether they are legally enforceable or not? And is it not so that even though a collective agreement is sparse in its coverage, it still targets collective, as opposed to individual, regulation? The legal nature of the agreement and

²⁸¹ Snell, p. 143.

²⁸² See e.g. Azoulay, p.1345. For similar reasoning, see Bercusson, p. 307.

²⁸³ For similar reasoning, see Reich, p. 863.

²⁸⁴ European Commission, The regulation of working conditions in the Member States of the European Union. Comparative labour law of the Member States, p. 100 and 102.

²⁸⁵ Bercusson, p. 287.

its coverage rather refers to how effective it is in attaining that aim, but that should have no bearing for the purposes of determining the aim as such. Consequently, I find it likely that Article 49 and 56 TFEU can be applied to collective action taken by trade unions even when the collective agreement in issue is not binding and when its coverage is comparatively sparse.²⁸⁶ However, since collective agreements in both Sweden and Finland are binding upon the parties once adopted and the coverage is extensive, the Court did not have to take a stance in this issue. Therefore the question remains uncertain. In any event, I believe that the misgivings about endless references to the ECJ concerning specific collective agreements are unfounded, or at least exaggerated. Firstly, the action must pass the legality review against national law before a reference to the ECJ becomes relevant. In the UK, for instance, the right to take collective action is quite restrained and it would be pointless to refer a case to the Court if the action was deemed illegal according to British law.²⁸⁷ Secondly, even though the systems of the Member States differ, they can be grouped into a limited number of models, at least as regards the effect of collective agreements.²⁸⁸ Hence, a review of each and every agreement would not be necessary.

In conclusion, I believe that most collective agreements within the bargaining systems of the EU would be considered to fulfil the collective regulation requirement. In turn, most collective action (provided that it passes the threshold for constituting a restriction) is liable to fall foul to the free movement of services. This should apply equally to discriminatory as well as non-discriminatory collective action, since discrimination is not a prerequisite for the application of the collective regulation requirement. This conclusion is further supported by Advocate General Mengozzi who in his opinion in *Laval* stressed that, since the line of demarcation between indirect discrimination and non-discriminatory restrictions is far from being entirely clear, to impose such a delimitation of the horizontal scope of Article 56 TFEU would affect the legal certainty of operators.²⁸⁹ Consequently, the answer to the question asked initially in this chapter is that Article 56 TFEU may be relied upon against trade unions when they are taking non-discriminatory collective action.²⁹⁰

²⁸⁶ A reservation must here be made that other circumstances may be relevant for adjudicating the collective regulation requirement.

²⁸⁷ European Commission, *The regulation of working conditions in the Member States of the European Union. Comparative labour law of the Member States*, p. 110.

²⁸⁸ *Ibid.*, p. 100 f.

²⁸⁹ The Opinion of AG Mengozzi in Case C-341/05 *Laval*, para. 228. See also Chapter 3.3 above where the corresponding argument was used with regard to imposing a test of discrimination for determining the existence of a restriction.

²⁹⁰ Should there be cases where an agreement would not be considered as having a collectively regulatory aim, the Angonese doctrine might be applicable to the field of services. In such a case, discrimination would be required and it would thus not be possible to invoke Article 56 TFEU to a trade union taking non-discriminatory

There is of course the possibility to interpret *Viking* and *Laval* more narrowly and argue that the ECJ based its rulings mainly on account of the circumstances of these particular cases in an attempt to provide a pragmatic solution. Following these logics, the reasoning in those cases cannot unreservedly be transferred to cases where the incentives for the ECJ to adopt such a solution are not as strong. In this context, it should be recalled that a prerequisite for the application of the *Walrave* doctrine is that the private body in issue enjoys autonomous power. Given the considerable autonomy granted to both sides of industry in the Scandinavian model of collective employment relations,²⁹¹ it can be argued that the outcome would be different in a case characterized by a national context where the autonomy of trade unions is more limited. In particular, when considering the responsibility conferred on Swedish trade unions to ensure that posted workers enjoy minimum wages as established by the PWD, it is not surprising that those unions were treated as a Member State with regard to the direct effect of the Treaty.²⁹² Consequently, one can contend that the conclusions in the *Laval* judgement cannot be extended to private measures which do not include the involvement of private parties in the implementation of a directive. In such cases, it can be argued that the dispute should rather be resolved by way of the *Schmidberger* solution whereby the focus would shift towards the legality of the national framework in which the action is protected.²⁹³ Last but not least, it can of course be alleged that the conclusions in *Viking* with regard to establishments cannot automatically be transposed to the service field.

However, these arguments are in my opinion not convincing. As far as autonomy is concerned suffice it to say that the right to take collective action constitutes an autonomous power which should be a sufficient power per se. Since the exercise of that power by itself is capable of effectively restricting free movement, the degree of autonomous powers in general does simply not seem material. As to the Posted Workers Directive, it is true that the incentives to apply Article 56 TFEU to trade unions in *Laval* were principally strong because of the regulatory task given to those unions. However, as the Court clarified in *Viking*, the exercise of a regulatory task is not a requirement for the application of the *Walrave* doctrine,²⁹⁴ and therefore the argument can be rejected. Finally, as regards the question whether the conclusions in *Viking* can be transposed to the service field, it must be borne in

collective action. However, since this would deprive the application of the *Walrave* doctrine to collective action of its meaning I find that highly unlikely.

²⁹¹ Bruun, N. and Malmberg, J., Ten Years within the EU – Labour Law in Sweden and Finland following EU Accession in Wahl and Cramér (Eds.) *Swedish Studies in European Law*, p. 78 ff. See also the Opinion of AG Mengozzi in Case C-341/05 *Laval*, para. 160.

²⁹² Kruse, p. 199.

²⁹³ For similar reasoning see Syrpis and Novitz, p. 421 f.

²⁹⁴ Case C-438/05 *Viking*, para. 65.

mind that those conclusions were in fact made by analogy from cases in the field of services and workers. Therefore, it would be inconsistent to say that those conclusions are not as valid with regard to collective action restricting the free movement of services as they are to those obstructing the freedom of establishment.

To sum up, it must be submitted that a narrow interpretation of the implications of Viking and Laval is possible, but that there is more to indicate a broader interpretation of the legal and practical scope of those judgements. Conclusively, Article 56 TFEU is in my view capable of catching collective action taken by trade unions, irrespective of the non-binding character and sparse coverage of the collective agreement it is seeking to enforce, regardless of its non-discriminatory character and in spite of a more limited trade union autonomy than the Scandinavian one.

4.6 Implications of the case-law on goods

Finally, I would like to make some remarks on the possible implications of the case-law on goods for the applicability of Article 56 TFEU to trade unions. As mentioned in chapter 4.1, the Court has consistently refused to give the Treaty provisions on goods horizontal direct effect. To say the least, it would be somewhat peculiar if the right to take collective action would be dependent on whether the action was directed against a service or a goods providing company. As case-law now stands, the former action will be caught by the prohibition against restrictions on the free movement of services and have to be justified against imperative requirements in the public interest, while the latter will escape the ambit of free movement. On the one hand, it can be asserted that the ECJ has deliberately separated between the freedoms as far as their effects are concerned, as it scarcely can be argued that the Court was unaware of the possible application differences that could follow. On the other hand, it is not impossible that the Court, when an opportunity is given, will bring the freedoms together and give Article 34 TFEU a semi-horizontal direct effect. As pointed out above, no such opportunity has thus far appeared and I can see no reason why the collective regulation requirement laid down in *Walrave* should not apply to collective action directed against a company dealing with goods. Furthermore, since collective agreements, by virtue of the *Albany judgement*²⁹⁵, have been removed from the Treaty competition rules, the argument that the conduct of private parties is primarily governed by those rules bears no scrutiny with regard to such agreements. Moreover, should the Court choose not to give Article 34 TFEU a semi-horizontal effect, the possibility remains to use the *Schmidberger solution* to collective

²⁹⁵ Case C-67/96 *Albany International v. Stichting Bedrijfspensioenenfonds Textielindustrie* [1999] ECR I-5751.

action directed against goods companies and thereby indirectly subjecting trade unions to Article 34 TFEU. However, to analyze the possibility to apply Article 34 TFEU to trade unions any further falls outside the scope of this essay. In any event, I do not believe that the refusal hitherto to apply Article 34 TFEU horizontally will exclude Article 56 TFEU from being applied to trade unions when taking non-discriminatory action, just as it did not preclude that provision from applying to the collective action taken in *Laval*. Consequently, the jurisprudence revolved around Article 34 TFEU will seemingly not implicate the application of Article 56 TFEU. Conversely, I find it more likely that the case-law on Article 56 will implicate the effect of Article 34.

5. Striking a balance between the freedom of movement and the right to collective action

Throughout the last decade the ECJ has usually referred to the four freedoms as fundamental principles and foundations of Union law.²⁹⁶ Simultaneously, it has placed an increasing focus on human rights and underlined their status as general principles of Union law.²⁹⁷ Hence, in *Viking* and *Laval*, the Court recognised the right to take collective action, including the right to strike, as a fundamental right which forms an integral part of those principles.²⁹⁸ In many cases the fundamental rights have complemented or even enhanced the enforcement of the fundamental freedoms. In *Viking* and *Laval*, however, the Court was faced with a conflict between them and it thus had to strike a balance between economic freedoms on the one hand and social policy objectives on the other. The aim of this chapter is to provide a legal analysis on how to solve such conflicts, or more particularly, the conflict between the freedom to provide services and the right to collective action. My main focus will lie on the solutions chosen in *Viking* and *Laval*, but since these cases were influenced by the *Schmidberger*²⁹⁹ and *Omega*³⁰⁰ judgements, in which the ECJ previously had been given the task to reconcile fundamental rights and free movement, I will start by reproducing the facts and the reasoning of the ECJ in those.

5.1 Schmidberger and Omega

The *Schmidberger* case, closely followed by *Omega*, is the first case where the Court had to deal with an apparent conflict between a fundamental freedom, i.e. the free movement of goods, and a fundamental right, namely the freedom of assembly and expression. The case concerned a demonstration organized by an environmental group on the main transit route linking Germany to Italy, resulting in the closure of the Brenner motorway for nearly 30 hours. The applicant, an international transport undertaking based in Germany, brought an action against the Austrian authorities for allowing the demonstration, claiming that it prevented their transportations to Italy, thus constituting a restriction on the free movement of goods. After finding that the failure to ban the demonstration amounted to a measure of

²⁹⁶ See e.g. Case C-112/00 *Schmidberger*, para. 51; Case C-36/02 *Omega*, para. 30; Case C-346/06 *Rüffert*, para. 36; Case C-1/05 *Yunying Jia v. Migrationsverket* [2007] ECR I-00001, para. 36 and Joined Cases C-482/01 and C-493/01 *Georgios Orfanopoulos and Others and Raffaele Oliveri v. Land Baden-Württemberg* [2004] ECR I-5257, para. 62.

²⁹⁷ Tridimas, p. 332.

²⁹⁸ Case C-438/05 *Viking*, paras 43-44 and Case C-341/05 *Laval*, paras 90-91.

²⁹⁹ Case C-112/00 *Schmidberger*.

³⁰⁰ Case C-36/02 *Omega*.

equivalent effect to a quantitative restriction, the Court stated that fundamental rights form an integral part of the general principles of law and that measures which are incompatible with the observance of human rights are thus not acceptable in the Community. Therefore, the protection of those rights was declared a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.³⁰¹ The Court continued by stressing that the requirements of the protection of fundamental rights, more particularly the freedom of expression and freedom of assembly guaranteed by Articles 10 and 11 of the ECHR, thus needed to be reconciled with those arising from a fundamental freedom enshrined in the Treaty. The Court then held that neither the free movement of goods, nor the freedoms of expression and assembly are absolute, since the former can be restricted for the reasons laid down in Article 36 TFEU or for overriding requirements relating to the public interest, and the latter can be limited in accordance with paragraph 2 of Articles 10 and 11 of the ECHR. The Court concluded that in those circumstances the interests involved must be weighed in order to determine whether a fair balance was struck between them. Important to note, however, is that the ECJ emphasized that the competent national authorities enjoy a *wide margin of discretion* in that regard.³⁰² In fact, the Court's assessment can be described as a review of the mere reasonableness of the decision, whereby the more detailed means of ensuring the protection of the fundamental rights in issue were left to the Austrian authorities.³⁰³ Nevertheless, the Court found it necessary to determine whether the restrictions placed upon inter-state trade were proportionate in the light of the legitimate objective of protecting fundamental rights. In this respect, circumstances such as the limited obstruction in time, space and seriousness and the various measures taken by the competent authorities in order to limit the disruption to road traffic were taken into account. Furthermore, the Court paid special attention to the fact that the objective of the demonstrators was not to restrict trade in goods but to manifest their opinion in public.³⁰⁴ As to the possibility to use less restrictive means the Court held that, taking account of the Member States' wide margin of discretion, the national authorities were entitled to consider that an outright ban on the demonstration would have constituted unacceptable interference with the fundamental rights

³⁰¹ Case C-112/00 *Schmidberger*, paras 64 and 71-74.

³⁰² *Ibid.*, paras 77-82.

³⁰³ See e.g. Azoulai, p.1349 and Tridimas, p. 338.

³⁰⁴ Case C-112/00 *Schmidberger*, paras 83-87. By these circumstances the Court distinguished the case from Case C-265/96 *Commission v. France* in which the French authorities were held responsible for violent acts committed by private individuals and by protest movements of French farmers directed against agricultural products from other Member States.

of the demonstrators. Similarly, the imposition of stricter conditions concerning both the site and the duration of the demonstration could have been perceived as an excessive restriction, depriving the action of a substantial part of its scope. The Court motivated these findings by stressing that an action of that type usually entails inconvenience for non-participants, in particular as regards free movement, but the inconvenience may in principle be tolerated provided that the objective pursued is essentially the public and lawful demonstration of an opinion. Finally, the Court accepted the argument of the Austrian government that all the alternative solutions which could be countenanced would have been liable to cause much more serious disruption to inter-state trade and public order. Consequently, the ECJ found that the national authorities were reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim of that demonstration could not be achieved by measures less restrictive of inter-state trade.³⁰⁵ The case has caused some confusion as to which ground of justification the Court applied.³⁰⁶ Was it the mandatory requirements or overriding reasons in the public interest, developed under the *Cassis de Dijon* line of jurisprudence or did the Court in fact introduce a new ground of justification?³⁰⁷ In paragraphs 79-81 of the judgement it seems as though the Court is heading towards a model based on the fundamental right as the main principle and the fundamental freedom as the exception. However, in paragraph 82, the Court makes a shift and subjects the disruption caused by the protection of the fundamental right to the traditional proportionality test, albeit with a more deferential approach than usual on account of the Member State (non)action. Consequently, whether the ground of justification is to be attributed to the mandatory requirements or not, free movement is to be considered as the guiding principle and the fundamental right as the tolerable exception, provided that it fulfils the requirements of the proportionality test.³⁰⁸

In *Omega*, the interests at stake were the freedom to provide services vis-à-vis respect for human dignity. The conflict arose from the Bonn police authorities' decision to prohibit the applicant Omega, a German company operating an installation known as a 'laserdrome', from commercially exploiting games simulating acts of homicide. In support of its action, Omega argued that the prohibition infringed Union law, particularly the freedom to provide services under Article 56 TFEU, since its 'laserdrome' had to use equipment and technology supplied

³⁰⁵ Case C-112/00 *Schmidberger*, paras 89-93.

³⁰⁶ See e.g. Brown, C., Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria*. Judgement of 12 June 2003, Full Court, CMLRev 40: 1499-1510, (2003), p. 1503 f.

³⁰⁷ See the wording of paragraph 74.

³⁰⁸ For similar reasoning, see Brown, p. 1507.

by a British company under a franchise agreement. The German courts rejected the action on the ground that commercial exploitation of a ‘killing game’ constituted an affront to human dignity, as established in Paragraph 1(1) of the German Basic (Constitutional) Law. As in *Schmidberger*, the ECJ resolved the issue by means of a soft proportionality test, leaving a wide margin of discretion to the competent national authorities.³⁰⁹ Again, the scales tipped over to the fundamental value at issue as protected by national constitutional law. However, in addition to the findings in *Schmidberger*, the Court made an important clarification as to the required status of the invoked fundamental right or value. The Court stressed that, within the context of the proportionality assessment, it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected.³¹⁰ Hence, the fact that the principle of respect for human dignity in Germany had a particular status as an independent fundamental right, not enjoyed in all Member States, did neither exclude the invocation of that principle as forming a part of the public policy derogation, nor preclude the measure at issue from being suitable and necessary. Consequently, the Court showed a great sensitiveness to the value diversity of the Member States and treated national constitutional standards not as contradicting the objectives of the Union, but as forming a part of it.

5.2 Viking and Laval

5.2.1 Exempting collective action from the free movement provisions?

In *Viking* and *Laval*, the arguments of the parties were not only confined to the possibility of justification, but were also revolved around the question whether the right to take collective action at all could be subject to the free movement provisions. The first argument in that regard was based on Article 137(5) EC, according to which the Union does not have competence to regulate the right to strike and the right to impose lock-outs. The defendants and the Swedish and Danish governments therefore argued that those rights fall outside the scope of the fundamental freedoms laid down in Article 49 and 56 TFEU. Not surprisingly, the Court rejected this argument, referring to well established case-law in the field of social security and direct taxation.³¹¹ In these cases, the Court has repeatedly pointed out that, even in the areas which fall outside the scope of the Union’s competence, the Member States must,

³⁰⁹ Case C-36/02 *Omega*, para. 31.

³¹⁰ *Ibid.*, paras 34-38.

³¹¹ Case C-438/05 *Viking*, paras 39-40 and Case C-341/05 *Laval*, paras 86-87.

when exercising their exclusive competence, nevertheless comply with Union law.³¹² The second argument, based inter alia on Article 11 of the EHRC, was that the right to take collective action constitutes a fundamental right which, as such, falls outside the scope of Article 49 and 56 TFEU. With reference to the European Social Charter, International Labour Organisation (ILO) Convention No. 87, the Union Charter of the Fundamental Social Rights of Workers and the EU Charter of Fundamental Rights, the Court did indeed recognize the right to collective action as a fundamental right which forms an integral part of the general principles of Union law. Nevertheless, it dismissed the argument. Firstly, the Court pointed out that this right may be subject to certain restrictions, which is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union as well as by Finnish and Swedish law. Secondly, the Court recalled the judgments of *Schmidberger* and *Omega*, where it was established that the exercise of fundamental rights does not fall outside the scope of the provisions of the Treaty, but must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality.³¹³ Accordingly, the mere fact that the right to take collective action can be characterized as fundamental could not remove it from the scope of the free movement provisions. The final argument, submitted by the FSU and ITF, was that the Court's reasoning in the *Albany judgment*³¹⁴ should be applied by analogy to the case in *Viking*. In that judgment, the ECJ exempted collective agreements from the application of the Treaty rules on competition, the rationale being that certain restrictions of competition are inherent in collective agreements and, consequently, that the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 81(1) EC.³¹⁵ According to FSU and ITF, the same reasoning was applicable in the context of the fundamental freedoms. However, without further explanation, the Court merely stated that so was not the case.³¹⁶ By firmly rejecting all three arguments, the ECJ thus established that there is, at least under circumstances comparable to those in *Viking* and *Laval*, no room for excluding the right to take collective action from the Treaty provisions on free movement.

³¹² See Case C-120/95 *Decker v. Caisse de maladie des employés privés* [1998] ECR I 1831, paras 22 and 23 and Case C-158/96 *Kohll*, paras 18 and 19 in relation to social security and Case C-334/02 *Commission v. France* [2004] ECR I 2229, para. 21 and Case C 446/03 *Marks & Spencer plc v. David Halsey* [2005] ECR I-10837, para. 29 in relation to direct taxation.

³¹³ Case C-438/05 *Viking*, paras 42-47 and Case C-341/05 *Laval*, paras 89-95.

³¹⁴ Case C-67/96 *Albany*.

³¹⁵ Case C-67/96 *Albany*, para. 59.

³¹⁶ Case C-438/05 *Viking*, paras 51-54.

5.2.2 Justification

As to the question of justification, the judgments in *Viking* and *Laval* have some common features, but differ on several points. In both cases, the Court underlined that the Union has not only an economic but also a social purpose and that the rights under the Treaty provisions on free movement thus must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 151 TFEU, inter alia, improved living and working conditions. Therefore, the right to take collective action for the protection of workers is a legitimate interest which, in principle, may justify a restriction on one of the fundamental freedoms guaranteed by the Treaty.³¹⁷ However, while in *Viking* the Court partly left this assessment, although with strict guidelines, to the national court, it determined the issue by itself in *Laval*.³¹⁸ Hereafter, I will present the Court's reasoning in the two cases separately, starting with *Viking*.

In *Viking*, the Court separated between the collective action taken by FSU on the one hand and the action of the ITF on the other. In regard of the former action the Court held that even if it could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not *jeopardised or under serious threat*.³¹⁹ Consequently, the Court added one condition for the national court to evaluate when determining the objective pursued by the trade unions. Relevant in this respect was the legal status of an undertaking made by Viking not to terminate the employment of any employees by reason of the reflagging. If it transpired that the undertaking was as binding as the terms of a collective agreement and was of such a nature as to provide a guarantee to the workers that the statutory provisions would be complied with and the terms of the collective agreement governing their working relationship maintained, the jobs or working conditions could not be considered as jeopardised or seriously threatened. Whether that was the case was left to the national court to consider.³²⁰ The ECJ then proceeded to comment on whether the collective action initiated by the FSU was suitable and necessary. As regards the suitability, the Court concluded that it is common ground that collective action may be one of the main ways in

³¹⁷ Case C-438/05 *Viking*, paras 76-79 and Case C-341/05 *Laval*, paras 102-105.

³¹⁸ So it did, even though Article 267 TFEU only gives the ECJ power to interpret the Treaty, not to apply the Treaty to the facts of a particular case, the latter being incumbent on the national court. However, the dividing line between interpretation and application can be perilously thin, more especially because many of the questions submitted to the Court are, by their nature, very detailed, and are capable of being answered only by a specific response. Hence, the ECJ's willingness to provide very specific answers serves to blur the line between interpretation and application, as is evident inter alia from *Viking* and *Laval*. See Craig and de Búrca, p. 493 f.

³¹⁹ Case C-438/05 *Viking*, para. 81.

³²⁰ Case C-438/05 *Viking*, paras 82-83.

which trade unions protect the interests of their members. As to the necessity test, the Court required an examination of whether the FSU had had other less restrictive means at its disposal in order to bring the collective negotiations to a successful conclusion and whether it had exhausted those means before initiating the action. That examination was also left to the national judges.³²¹ In respect of the collective action seeking to implement the ITF policy, on the other hand, the ECJ excluded all possibilities of justification. The Court's two main concerns were, firstly, that the policy was directed against the nationality of the beneficial owner of the vessel and, secondly, that the ITF policy came into play regardless of whether the reflagging in issue was liable to have a harmful effect on the work or conditions of employment of the employees concerned. Therefore, the action of the ITF did not come within the scope of protection of workers.³²²

In *Laval* the Court submitted that blockading action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, in principle, falls within the objective of protecting workers. However, when it came to the *specific obligations* linked to the signature of the collective agreement at issue, the obstacle which the collective action formed could not be justified with regard to such an objective. This finding was directly linked to the requirements of the Posted Workers Directive and was motivated by the fact that the employer of the home state is required, as a result of the coordination achieved by that directive, to observe a nucleus of mandatory rules for minimum protection in the host Member State and the requirements of the collective agreement for the building sector in certain aspects fell outside that nucleus.³²³ As to the collective action which sought to impose negotiations on pay, the Court held that when such negotiations form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for the undertaking to determine the obligations with which it is required to comply as regards minimum pay, that action cannot be justified in the light of the objective of protecting workers.³²⁴

To sum up, the action taken by the ITF as well as those initiated by Byggnads was not considered to fall within the aim of protecting workers, while the justifiability of the action taken by the FSU was left to the national court.

³²¹ *Ibid.*, paras 84-87.

³²² *Ibid.*, paras 88-89.

³²³ Case C-341/05 *Laval*, paras 107-108.

³²⁴ Case C-341/05 *Laval*, paras 109-110.

5.3 Legal analysis of Viking and Laval

5.3.1 *The recognition of the right to collective action as a fundamental right*

The recognition in *Viking* and *Laval* of the right to collective action as a fundamental right has been described as a step forward for the trade union movement and as an important clarification of its status in Union law.³²⁵ Another essential feature of the judgments is allegedly that the ECJ referred to a variety of international human rights sources, thus acknowledging the relevance of other instruments and bodies in the human rights field.³²⁶ Not least, the citing of the European Charter of fundamental rights has been held vital, since the Court thereby demonstrated a willingness to use it as an independent source of fundamental rights in Union law.³²⁷ More importantly, it indicates how the ECJ will apply the Charter now that it has become legally binding by virtue of the entry into force of the Lisbon Treaty. Noticeable though, is that the Court did not refer to Article 11 of the European Convention on Human Rights (ECHR), which guarantees the freedom of association including the right to form and join trade unions. However, by virtue of Article 6(2) EU, the Court is required, although not formally bound, to respect the standards of the Convention.³²⁸ In any event, the mere recognition of the right to collective action can be held to strengthen its position in Union law. However, despite its status as a fundamental right the Court made it subject to the Treaty provisions on free movement and conditional on the satisfaction of the proportionality test. It thus seems motivated to ask whether the ECJ thereby introduced a formal hierarchy between fundamental freedoms and fundamental rights and gave primacy to the former. Should that be the case, it would seem as if the recognition of the right to collective action as a fundamental right was quite insignificant. In my opinion the question must however be answered in the negative. Conversely, the Court's intention was to adopt a "consensualist" model based on the possibility to reconcile the interests at stake, as it did in *Schmidberger* and *Omega*. This solution thus contrasts to the conflictual conception applied in *Albany*, which, if chosen, would have constituted a hierarchy in favour of fundamental rights.³²⁹ As the Court underlined, the right to collective action is not absolute and must, pursuant to Article 28 of the Charter and to the constitutions of the Member States concerned, be exercised in accordance

³²⁵ See e.g. Davies p. 126 f.

³²⁶ *Ibid.*, p. 138.

³²⁷ See e.g. Kruse p. 200 f.

³²⁸ Tridimas, p. 342.

³²⁹ See further Azoulai, p. 1347 ff.

with national law and practices as well as Union law.³³⁰ In addition, Article 52 of the Charter admits to limitations of the freedoms and rights recognized by it, provided that the limitations are proportionate and respect the essence of the freedom or right concerned. This further supports the consensualist conception announced by the Court. Moreover, the consensualist approach is, in my view, also in line with the case-law of the European Court of Human Rights (ECtHR) concerning Article 11 ECHR.³³¹ This article contains a positive right of association including a right for trade unions to resort to collective action. On the other hand, it comprises a negative aspect, that is, a right not to be forced to join an association.³³² This negative right can be relied upon by an employer, such as Viking Line or Laval, who wish not to be forced into a collective bargaining system. Consequently, the positive right of association and the corresponding right to collective action must be balanced against the negative right of association and the related freedom of movement, in order to strike a fair balance between them. A solution based on the exclusion of the right to collective action from Article 49 and 56 TFEU would thus have given unlimited primacy to that right over both the negative right of association and the freedom of movement in contradiction to ECHR as well as the TFEU. Therefore, a model of reconciliation seems to be the only tenable choice. Accordingly, the Court was correct in rejecting all arguments which advocated for the exclusion of the right to collective action from the Treaty provisions on free movement.³³³ That said, it is not immaterial that the Court used free movement as the main principle and the right to collective action as the exception. As Höfner rightly points out, with an inappropriate use of the proportionality principle, the Court risks creating a *de facto* hierarchy between the fundamental freedoms and fundamental rights within the EC legal order.³³⁴ I will return to this below.

5.3.2 *The protection of the right to collective action – a legitimate aim?*

At first sight, it might seem as if the model chosen for reconciling fundamental freedoms and fundamental rights in *Schmidberger* and *Omega* was also applied in *Viking* and *Laval*,

³³⁰ Case C-438/05 *Viking*, para. 44 and Case C-341/05 *Laval*, paras 91-92.

³³¹ The ECJ is not bound by the case-law of the ECtHR, but has generally been prepared to be led by the ECtHR in recognizing or refusing to recognize rights, see Tridimas p. 342 ff. Therefore, it seems motivated to look at precedents from the ECtHR for the purposes of analysing *Viking* and *Laval*. See above Chapter 1.4.

³³² Case of *Gustafsson v. Sweden*, judgment of 25 April 1996, Reports of Judgments and Decisions 1996-II and Case of *Sørensen and Rasmussen v. Denmark*, judgment of 11 January 2006, Reports of Judgments and Decisions 2006-I.

³³³ For similar reasoning see Reich p. 857 f.

³³⁴ Höfner, p. 11.

although with different outcomes.³³⁵ However, at a closer look, one can discern some crucial differences, one of them which relates to the possibility to use the protection of the fundamental freedom as a legitimate aim of justification. In *Schmidberger* and *Omega*, the protection of fundamental rights was accepted as a legitimate aim in itself. In *Viking* and *Laval*, however, the protection of the right to take collective action was not sufficient in that regard. In addition, it had to be established that the collective action, in turn, pursued a legitimate aim in compliance with the objectives of the Union, namely that of protecting workers.³³⁶ This difference can be explained by the fact that the former cases concerned *the State's protection* of fundamental rights while the latter regarded *private parties' exercise* of such rights. As the Court explained in *Schmidberger*, the demonstrators' aim to protect the environment could not be imputable to the Member State, whose sole purpose when allowing the demonstration was to protect the freedom of assembly and expression.³³⁷ In *Viking* and *Laval* on the other hand, the target was not the respective Member State's protection of the right to take collective action, but the trade unions exercise of it, whereby the aim of the trade unions became relevant for the purposes of justifying the action.³³⁸ As logical as this reasoning may seem, it can nevertheless lead to odd results. If a challenge of collective action under the Treaty provisions on free movement is invoked against a Member State for allowing the action, instead of against the responsible trade union, would it not be possible, following the reasoning in *Schmidberger*, for that State to rely on the protection of such action as a legitimate aim in itself? However, such a differentiated application would run counter to one of the alleged main reasons for subjecting trade unions to the free movement provisions, i.e. to maintain the uniform application of Union law.³³⁹ Regardless of how the Court will solve that issue, it can be concluded that the protection of the right to take collective action seemingly cannot be used as an independent ground of justification when invoked by a trade union. Consequently, the possibility of justifying collective action will be dependent on whether the particular action can be considered as falling within the aim of protecting workers. But is this really a problem? Given that the Court repeatedly has held that protection of workers is a legitimate aim as well, one ground of justification seems as good as the other. In *Viking* and *Laval*, however, it was proven that so is not the case. By adding, in *Viking*, the requirement that the jobs or conditions of employment has to be jeopardised or under serious

³³⁵ In support of such an opinion see e.g. Kruse, p. 202.

³³⁶ See further Davies p. 141 f. and Hös, p. 8.

³³⁷ Case C-112/00 *Schmidberger*, paras 66-68.

³³⁸ See in this respect the Opinion of AG Mengozzi in Case C-341/05 *Laval*, paras 243-245.

³³⁹ See chapter 4.2 above.

threat, it seems as though the Court is unwilling to take account of positive long term effects of collective action if no immediate danger to the working conditions can be established.³⁴⁰ If trade unions are only allowed to protect the terms of the current crew, from which newly hired workers won't benefit, the consequence may well be a gradual decline in worker protection over time.³⁴¹ The rejection of the ITF policy arguably entails the same consequence with regard to solidarity action. Given that the rejection was based on the policy's automatic character, the Court implies that it is not sufficient for unions to show the overall benefits of a policy for the protection of workers. Instead, they must be able to show the actual benefits of each action.³⁴² This narrow interpretation of workers protection is in direct opposition to the approach taken by the ECtHR in *Gustafsson v. Sweden*. In that case, the ECtHR took account, not only of the collective action at issue in the case, but also of the benefits which the Swedish collective bargaining system as a whole created for the protection of workers. Therefore, the ECtHR found no reason to doubt that the action pursued a legitimate interest.³⁴³ Furthermore, in *Laval*, the Court refused to accept workplace-level collective bargaining on minimum wages as falling within the objective of protecting workers. This rigid attitude towards the Scandinavian collective bargaining model contrasts significantly to the sensitiveness the Court demonstrated to national value diversity in *Omega*, where the precise way in which the fundamental right or legitimate interest in question is to be protected was held to be incumbent on each Member State. Should the Court persist in these views, they will amount to substantial restraints on the right to take collective action.

5.3.3 Proportionality and the margin of discretion

Another crucial difference between *Schmidberger* and *Omega* and *Viking* and *Laval* is the wide margin of discretion to balance the conflicting interests that was left to the respective states in the former cases, but denied the trade unions in the latter. Hereby, the ECJ also chose to take a different path than the ECtHR, who has conferred on the Contracting States a *wide margin of appreciation* as to how the freedom of trade unions to protect the occupational interests of their members may be secured.³⁴⁴ This might explain why the Court refrained from citing the ECHR in support of the right's status as a fundamental principle of Union law. This firm treatment of trade unions as compared to the more lenient approach towards

³⁴⁰ Hös, p. 21 and Reich p. 869.

³⁴¹ Davies, p. 144.

³⁴² For similar reasoning see Reich p. 868.

³⁴³ *Gustafsson v. Sweden*, para. 53.

³⁴⁴ *Sorensen v. Rasmussen*, para. 58.

Member States is in my view somewhat surprising, since the Court, by way of horizontal application, did not hesitate to impose on the trade unions the obligations of a state to respect free movement.³⁴⁵ This is all the more so since it seems highly motivated to grant private parties an even wider margin of discretion, given that those parties, unlike the Member states, are not bound by the loyalty obligation laid down in Article 4(3) TEU.³⁴⁶ Instead, the Court merely transposed a strict application of the principle of proportionality, which was developed mainly to review measures of the state, to measures of private parties. The novelty does not lie in the fact that the ECJ applied the proportionality principle in a private law context – so has been done *inter alia* in sex discrimination cases – but in the way the Court used that principle to defy the invocation of a fundamental right. In discrimination cases, the starting point is the protection of the fundamental right not to be discriminated against on the basis of sex, and the violation of this right must be proportionate.³⁴⁷ By contrast, in *Viking* and *Laval*, free movement was the point of departure and the fundamental right the derogation which had to be proportionate. Even though this was the case also in *Schmidberger* and *Omega*, the Court managed in those cases to offset the advantage thus given to free movement by granting the counterpart of discretion as regards the means to ensure the protection of the fundamental right. In particular, when considering the deferential approach the Court took in *Schmidberger* in regard of the (non)possibility to use less restrictive means, compared to the firm “less-restrictive-alternative test” it required in *Viking*, the contrast between the cases becomes evident. While in *Schmidberger* the Court paid special attention to the risk of depriving the demonstration of a substantial part of its scope, that is, the relative effectiveness of the demonstration, it did not even consider that issue with regard to the collective action in *Viking*. This, even though that issue was just as relevant in *Viking*, since collective action, like demonstrations, entail a direct conflict between the efficiency of the action on the one hand and the disruption for non-participants on the other. In other words, the greater disruption the collective action causes to the employer, the more effective it is likely to be in compelling the employer to make concessions. There are of course several ways for trade unions to protest against employers’ action without restricting free movement, such as a march or a leafleting campaign, but the relative effectiveness of those measures must be taken into account when determining whether there are less restrictive means at disposal. In other words, they must be capable of achieving in essence the same result as the measure under review in order to be

³⁴⁵ See Azoulai p. 1350.

³⁴⁶ See further Reich p. 870.

³⁴⁷ See e.g. Case C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* [1999] ECR I-623

treated as genuine alternatives.³⁴⁸ However, if the proportionality test is supposed to serve as a way of reconciling freedom of movement and the right to collective action, the action may not be so effective as to deprive the freedom of its meaning.³⁴⁹ Correspondingly, the freedom of movement must not undermine the essence of the right to collective action so that workers will be deprived of adequate protection. Arguably, the former scenario was the Court's main concern in *Viking*, given that the collective action in question prevented the company from making use of the right to freely establish itself in another Member State. At least, this seemed to be the apprehension of Advocate General Maduro, who held that Article 49 TFEU should preclude collective action which has the effect of partitioning the labour market, as it would strike at the heart of the principle of non-discrimination.³⁵⁰ So what should have been the result of the balancing on interests in *Viking*?³⁵¹ In my opinion, the aim to retain Finnish working conditions could probably not have been satisfied by less restrictive means. Therefore, the reconciliation would inevitably have boiled down to a question of where the limit for workers protection is to be drawn, that is, the degree to which workers can claim protection. That assessment would thus amount to a proportionality test *strictu sensu*, according to which an action with too excessive effects on free movement (or, correspondingly, too excessive claims on the level of workers protection) will be considered as disproportionate. In *Viking*, the claimed degree of protection, i.e. the working conditions established in Finnish law and collective agreements, was arguably too far-reaching, as it prevented the employer from making use of the freedom of establishment. Hence, although there might not have been any less restrictive means for ensuring that level of protection, the action would nevertheless have fallen foul to the proportionality test *strictu sensu*. It is true though, that the Court never went so far as to this third step of the proportionality review, thus implying that the issue could be settled already at the second step. However, it can also be explained by the fact that a proportionality review *strictu sensu* would have required the Court to interfere with sensitive matters of national social policy, or, more particularly, to specify the agreeable level of national workers protection. The latter explanation is what I consider to be most likely, since the ECJ generally is more cautious in adjudicating such matters.³⁵² Consequently, by merely leaving the necessity assessment to the national court, the ECJ managed to avoid the delicate task of balancing the interests at stake, but still signal the

³⁴⁸ See further Davies p. 143.

³⁴⁹ Hös, p. 28.

³⁵⁰ The Opinion of AG Maduro in Case C-438/05 *Viking*, para. 62.

³⁵¹ Since the parties reached a settlement out of court the question was never adjudicated by the national court.

³⁵² de Búrca, G., *The Principle of Proportionality and its Application in EC Law*, YEL, 13, (1993), p. 111.

desired outcome by denying the trade unions the relief of discretion. In *Schmidberger* on the other hand a proportionality test strictu sensu was not as controversial. The demonstration, which was limited in site and duration, kept within the level of acceptable protection and the Court therefore made clear that the transportation companies had to tolerate the inconvenience with regard to free movement which the demonstration created.³⁵³

It has been held that subjecting the right to collective action to any form of proportionality test would be inappropriate, since such a test is particularly problematic in an industrial action context. As Bercusson points out, that right is inextricably linked to the collective bargaining process and must be assessed in the context of that process. In his opinion it is difficult to sensibly apply such a test to the demands of a trade union, given that it is in the very nature of negotiations that both parties set demands at their highest and through negotiation over time seek a compromise. He rightly asks himself at what stage of this process and against what criteria the test is to be applied.³⁵⁴ Although I agree with his points in substance, I would not go so far as to rule out the application of any form of proportionality review. As mentioned above, the European Charter of Fundamental Rights accepts limitations to the right to collective action insofar as the right at issue is not deprived of its essence. In my view, it is here the problem lies with the proportionality test applied in *Viking*. By refusing the unions the relief of discretion, the ECJ created a climate of insecurity as to the legal scope of collective action under Union law, capable of disturbing the balance between the parties of the collective bargaining process. Thereby, it deprives the right to collective action of a substantial part of its essence. In my opinion, trade unions must enjoy a wide margin of discretion, both with regard to the test of necessity and to the proportionality test strictu sensu. Hence, only actions which are manifestly inadequate for ensuring protection of workers or actions which undermines the meaning of free movement, e.g. by grossly violating the non-discrimination principle, should be considered as disproportionate.³⁵⁵

As follows from the foregoing, the recognition of the right to collective action as a fundamental right may have been important in principle, but proved to be less important in practice. By not accepting the protection of that right as a legitimate aim per se combined with the denial of a wide margin of discretion, the ECJ appears to have introduced a de facto hierarchy between fundamental freedoms and the fundamental right to collective action. Seemingly, primacy was given to the former.

³⁵³ For similar reasoning see Hös p. 12.

³⁵⁴ Bercusson, p. 304.

³⁵⁵ For similar reasoning see Reich p. 870 and the Opinion of AG Maduro in Case C-438/05 *Viking*, paras 62-71.

5.4 General consequences of *Viking* and *Laval* for the right to collective action

So what general conclusions for the right to collective action can be drawn from the Court's findings in *Viking* and *Laval*? Would the outcome be as harsh for a trade union whose collective action is neither aimed at, nor has the effect of adversely affecting cross-border situations as compared to internal ones? To start with the question whether the right to collective action can be exempted from the scope of the Treaty provisions on free movement, I dare say that such a possibility is excluded, regardless of the non-discriminatory nature of the action. The judgements in *Schmidberger*, *Omega*, *Viking* and *Laval* are consistent: fundamental rights which are not absolute will not *prima facie* escape the ambit of free movement solely by virtue of their status as such rights. The challenged measures in both *Schmidberger* and *Omega* can be characterized as non-discriminatory, but that had no bearing on this conclusion. The same should apply in regard of non-discriminatory collective action.

As to the question of justification, the statements of the Court in *Viking* and *Laval* may not be as generally applicable. It seems undisputable though, given that the judgements are unanimous on this point, that the protection of collective action cannot be used as an independent ground of justification when invoked by a trade union. However, in my opinion, there are reasons to question whether all collective action will be subject to such strict scrutiny as in *Viking* and *Laval* with respect to the aim of protecting workers. The added requirement in *Viking* that the jobs or working conditions has to be seriously threatened was, as paragraph 82 of the judgement indicates, compelled by the undertaking made by Viking Line not to terminate the employment of any employees by reason of the reflagging. Accordingly, when such an undertaking is not involved, the Court might not put any emphasis on the requirement at issue. Furthermore, it should not be forgotten that this requirement was introduced in a company relocation context and, consequently, it is not beyond questioning that the Court will apply this requirement in other situations. The fact that the requirement was not repeated in *Laval* supports that assumption. Even though indisputably short-sighted, demanding that a relocation actually threatens the jobs or working conditions in some sense seems fairly rationale. But if that requirement is strictly upheld in other contexts, for instance when the collective action is prompted by a demand for higher wages, it would rule out any collective action with market access implications that is aimed at *improving* working conditions. Surely, that cannot be the Court's intent. As regards the rejection of the ITF policy, the opinion of Advocate General Maduro may shed light on the Court's reasoning. The Court as well as its advocate general accepted that a policy of coordinated action as a

means to improve the terms of employment is, in principle, aimed at protecting workers, but were concerned with the automatic character of the ITF policy.³⁵⁶ While the Court was relatively silent as to the reasons for this concern, the advocate general explained it by the fact that such a policy may be abused in a discriminatory manner. In his opinion, such a policy would be liable to protect the collective bargaining power of some national unions at the expense of the interests of others, and to partition the labour market in breach of the rules on freedom of movement. Arguably, this means that a policy which merely entails long-term positive effect for the protection of workers still will be justifiable as long as those effects are not liable to be discriminatory. Even though the Court did not explicitly refer to the advocate general, it followed his reasoning in effect. Consequently, if faced with a case concerning non-discriminatory collective action, it is in my view not impossible that the Court will take inspiration from its advocate general and take a more deferential approach. As regards the assessment in *Laval*, the Court's main concern was arguably the way in which Sweden had implemented the PWD and the outcome a direct result thereof. The fact that the ECJ refused to consider work-place level bargaining as a means for protecting workers in a posted workers context does not necessarily mean that that is the Court's general attitude towards such bargaining. Hence, the conclusions reached in *Laval* cannot unreservedly be transposed to cases which do not concern posted workers.

In regard of the proportionality review it should first be noted that this is a highly context-sensitive test, which differs considerably from case to case.³⁵⁷ Therefore, it would be hasty to draw too far-reaching conclusions from the review in *Viking*. As *de Búrca* emphasises, the way the proportionality principle is applied covers a spectrum ranging from a very deferential approach, to quite a rigorous examination of the justification for a measure which has been challenged. The level of scrutiny will depend inter alia on the nature of the interest involved, the existence of Union competence in the area and the severity of the challenged restriction. The ECJ generally takes a more deferential approach if the interest of the State concerns an area involving national economic and social policy choices and if the aim of the measure primarily lies within the competence of the Member State.³⁵⁸ This would explain why the Court left the national court with such sparse guidance in regard of the necessity test in *Viking*. On the other hand, it fits ill with the refusal to grant the trade union a wide margin of discretion. However, this may be due to the severity of the actions taken by the FSU and ITF

³⁵⁶ Case C-438/05 *Viking*, paras 88-89 and the Opinion of AG Maduro, paras 70-72.

³⁵⁷ Davies, p. 142; Hös, p. 5 and de Búrca p. 114.

³⁵⁸ de Búrca, p 110 ff.

and, as stressed above, the will to signal that the actions were not justifiable. Personally, I can see no other reason for imposing on a trade union, whose action is consistent with national law, an element of self-regulation with regard to EU law, stricter than that of the Member State. It should also be borne in mind that the Court did not explicitly deny trade unions the relief of discretion – it simply did not admit to it. In my view, it seems far from unlikely that the Court will admit to such discretion in a case where the disruption to the freedom of *movement* is not as severe, thus bringing the application in line with *Schmidberger* and *Omega* as well as with the case-law of the ECtHR. In fact, it could even be held that the outcome in *Viking*, although not the explicit reasoning, is consistent with the case-law of Strassbourg. In *Sorensen v. Rasmussen* the ECtHR held that where the domestic law of a Contracting State permits actions which run counter to the freedom of choice of the individual inherent in Article 11, the margin of appreciation must be considered as reduced. A similar reasoning can be applied with regard to the collective action in *Viking*; since the actions taken by the FSU ran counter to the very essence of the freedom of establishment, the margin of discretion diminished. Consequently, the ECJ might implicitly have followed the reasoning of the ECtHR.³⁵⁹ If so, this further supports that the Court is prepared to apply a more lenient approach when the restriction is not as severe. In addition, the Court seemingly takes regard of whether the aim of the action includes an element of protectionism. This was evident in *Schmidberger* where the Court underlined that the purpose of the demonstration was not to restrict trade in goods of a particular type or from a particular source.³⁶⁰ This statement suggests that the margin of justification widens when there is no protective aim of the measure. Since the collective action taken by the trade unions in *Viking* was eminently protective, the margin of justification narrowed. Following this logic, a collective action which has no such aim, e.g. an ordinary wage strike, will enjoy a greater margin of justification.

In conclusion, the question on how to strike a balance between the freedom of movement and the right to collective action was in my opinion most likely not settled once and for all in *Viking* and *Laval*. On the contrary, there is much to indicate that the ECJ might restore the balance which was disturbed in those cases.

³⁵⁹ For similar reasoning with regard to *Laval*, see Belavusau, U., The Case of *Laval* in the Context of the Post-Enlargement EC Law Development, GLJ, Vol. 09, No. 12, (2008), p. 2305.

³⁶⁰ Case C-112/00 *Schmidberger*, para. 86.

5.5 Implications of the binding nature of the Charter of fundamental rights

As mentioned above in chapter 5.3.1, since the Court delivered its judgement in *Viking* and *Laval*, the EU Charter of fundamental rights has become legally binding by virtue of the entry into force of the Lisbon Treaty. May this have any implications on the Court's application of the free movement provisions to the right to collective action? Given that the Court actually did take account of the Charter when recognizing the right to collective action as a fundamental principle of Union law in both *Viking* and *Laval*, the answer seems to be negative.³⁶¹ On the other hand, it is noticeable how the Court refrained from referring to the Charter again when it was considering how the right to collective action may legitimately be limited.³⁶² Arguably, the Court will from now on have to apply the Charter provisions dealing with those issues alongside the Treaty provisions when a fundamental right protected by that charter is involved. But will this really make any difference in the collective action versus free movement context? Article 28 of the Charter clearly stipulates that the right to collective action exists only within the limits of Union law, thus confirming the accuracy in the Court's choice to regard that right as a derogation to free movement. Consequently, it seems unlikely that the entry into force of the Lisbon Treaty will induce the Court to change this legal practice.³⁶³

This does not mean however that it will have no implications at all. As mentioned above, Article 52(1) of the Charter requires that any limitation on the exercise of the rights and freedoms recognized therein must be proportionate and respect the essence of the freedom or right concerned. In *Viking* and *Laval*, the Court was more concerned with the proportionality of the restrictions to the Treaty freedoms of movement and the preservation of their essence. Accordingly, the ECJ will now have to take account of the proportionality of the restriction which the freedom of movement creates to the right to collective action and vice versa and make sure that the essence of both the right and the freedom are preserved. In other words, it must actually perform the reconciliation which was initially announced to take place in those cases. This could in my opinion be accomplished by granting the trade unions a wide margin of discretion and by taking account of the interference that free movement causes to the right to collective action within the framework of the necessity test, as the Court did in *Schmidberger*.

³⁶¹ Case C-438/05 *Viking*, paras 43-44 and Case C-341/05 *Laval*, paras 90-91.

³⁶² Davies, p. 139.

³⁶³ See Persson, T., *An Unfinished Polity*, in Gustavsson, Oxelheim and Pehrson (Eds.), p. 17.

Furthermore, Article 52(3) of the Charter stipulates that the meaning and scope of the rights in the Charter that correspond to rights guaranteed by the ECHR shall be the same, unless Union law provide for more extensive protection. One such right is the freedom of association established in Article 12(1) of the Charter, which, pursuant to the explanation,³⁶⁴ correspond to Article 11 of the ECHR. According to the explanation, the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the ECtHR and by the ECJ. Even though this does not make the ECJ bound by the jurisprudence of the ECtHR it still promotes deference on the part of the ECJ to the ECtHR.³⁶⁵ Hence, Article 52(3) of the Charter read together with the explanation to that article, provides for incentives for the Court to apply the more lenient approach employed by the ECtHR with regard to the right to take collective action inherent in the freedom of association.³⁶⁶ Whether the Court actually will adhere to these incentives remains however to be seen.

³⁶⁴ The explanation to the Charter has no legal value, but is simply intended to clarify the provisions of the Charter.

³⁶⁵ Craig and de Búrca p. 416.

³⁶⁶ See Chapters 5.3.1 and 5.3.3 above.

6. Discussion and conclusions

To include non-discriminatory collective action within the scope of Article 56 TFEU would unquestionably be a broad interpretation of the free movement of services, but certainly not an impossible one. Holding private parties accountable for non-discriminatory restrictions on the free movement of services caused by the exercise of a fundamental right would supposedly take free movement quite a few steps further than the drafters of the EEC Treaty³⁶⁷ originally intended. However, due to the ECJ's expanding interpretation of the notion of a restriction, from a mere prohibition on discrimination to a ban against all measures liable to affect the market access to another Member state, combined with the introduction of (semi-)horizontal direct effect, such an outcome is today possible. During the course of this essay, these questions – limiting the scope of application, horizontal direct effect and reconciling fundamental rights and fundamental freedoms by way of a proportionality test – have for the most part been treated separately. Yet, these issues are closely interrelated. There is a direct link between the test defining the scope of application of free movement and the application of the proportionality test. Since national measures can fall more easily under the scope of the four freedoms in a market access test than in a discrimination test, the proportionality test will to a great extent define which measures are lawful under Union law and which ones are not.³⁶⁸ Likewise, the possibility to apply Article 56 TFEU horizontally is intimately linked to the existence of a restriction and to the way in which the proportionality principle is applied. Naturally, actions of private parties can scarcely constitute restrictions on free movement if the free movement provisions cannot be applied to such actions, that is, if they are not capable of having some form of horizontal direct effect. And what exactly has to be balanced under the proportionality principle in horizontal situations? Is it the effective functioning of the internal market that must be balanced against the protection of a fundamental right? Or is it rather the interests of the specific employers and workers that must be balanced against each other? Can a principle developed mainly to review state measures and regulations be applied as strictly to actions of private parties, particularly in their exercise of a fundamental right?

In my opinion, this is mainly where the judgements in *Viking* and *Laval* went wrong, that is, the problem does not lie so much in the assessment of each question as in the fact that the Court refrained from taking account of the combined effect of these assessments. Hence, it is

³⁶⁷ The Treaty establishing the European Economic Community which preceded the Treaty establishing the European Community which, in turn, preceded the TFEU.

³⁶⁸ Hös p. 5.

rather the effects that *Viking* and *Laval* might cause on national collective bargaining systems, than the outcomes per se, I turn against. The combined effect of using a far-reaching market access test and apply it to the actions of trade unions while at the same time limiting the grounds of justification and restricting the margin of discretion, is namely to create a risk of undermining the effectiveness with which labours standard can be applied to national level.³⁶⁹ Even though not every collective action will fall foul to the market access test, it is likely to catch the vast majority of them. Accordingly, not only actions of the types in *Viking* and *Laval* aimed at battling competition from low-wage Member States with the effect of discriminating against such states, but also more “ordinary” actions, e.g. strikes or blockades initiated against domestic employers in order to enforce higher wages or to reduce the use of hired personnel may come within the scope of Article 56 TFEU. Also in those cases, the burden of proof will in practice shift from the service provider to establish the existence of a restriction to the trade unions to justify their action under the test of proportionality. Given the harsh criteria that the Court set up in the latter regard, this will be quite a heavy burden for trade unions to bear. If interpreted strictly, these criteria would inter alia entail that trade unions only are allowed to take collective action in order to protect the current terms of the current staff, that work-place level bargaining is not an acceptable method for protecting workers and that trade unions do not enjoy a wide margin of discretion when determining whether there are less restrictive means at disposal. Should the Court stringently uphold these criteria, it seems as if few actions could be considered lawful under Union law. Now that is hardly the Court’s intent. Thus, in order to avoid such consequences the Court will either have to create a link between the questions of limiting the scope of application, horizontal direct effect and justification or simply reverse some of the conditions of justification it set up in *Viking* and *Laval*. One way of accomplishing the former would be to regard private measures as restrictions only when some form of discrimination is involved. However, discrimination as a criterion for the application of the *Walrave* formula has for long been abandoned and it thus seems unlikely that the Court would reintroduce that criterion. Another solution would be to mitigate the conditions of justification in horizontal situations, at least when the private parties are exercising a fundamental right, as suggested in chapter 5.3.3. This was the solution advocated for by Advocate General Maduro in his opinion in *Viking* and the one which actually was applied in *Schmidberger*. In my view, this would also be the best way both to preserve the autonomy of private parties and to reconcile fundamental freedoms and

³⁶⁹ Deakin p. 21

fundamental rights. In any event, now that the Court has chosen to apply the far-reaching market access test to collective action and given Article 56 TFEU a semi-horizontal direct effect it is all the more important that the principle of proportionality, which in practice will determine the legality of such action, is applied in a predictable and consistent manner. Unfortunately, the Court's interpretation of that principle has not always been that predictable and consistent and, as is evident from *Viking* and *Laval*, is often difficult to transpose to other contexts. This brings an element of insecurity into national collective bargaining systems which primarily will work in favour of the employer's side, since trade unions will have a hard time determining the legality of their actions under Union law. Hence, in order to avoid such disturbance in the balance of industrial relations, the Court must clarify the application of the proportionality principle in the collective action versus free movement context. Until then, the scope of the free movement of services, in particular the margin of justification, with regard to non-discriminatory collective action must be regarded as an unsettled issue in Union law.

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